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No.

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In the Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT P. AGUILAR

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTIONS PRESENTED

1. Whether an individual who endeavors to obstruct a grand jury proceeding by making false and misleading statements to prospective witnesses may be prosecuted for obstruction of justice, within the meaning of 18 U.S.C. 1503.

2. Whether an individual who knows of an application for authorization to intercept telephone conversations and who discloses its existence to a target in order to impede the interception of the target's conversations may be found guilty of violating 18 U.S.C. 2232(c), regardless of whether the authorization has expired at the time the disclosure was made.

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The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the en banc court of appeals (App., *infra*, 1a-28a) is reported at 21 F.3d 1475. The opinion of the panel of the court of appeals (App., *infra*, 29a-113a), which was subsequently vacated, is reported at 994 F.2d 609.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1994. On July 11, 1994, Justice O'Connor extended the time for filing a petition for a writ of certiorari to August 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. 1503 provides:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

2. 18 U.S.C. 2232(c) provides, in relevant part:

Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 [of Title 18] to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT

This case arises from the prosecution of respondent United States District Judge Robert Aguilar of the Northern District of California. He was convicted after a jury trial on two counts of a multi-count indictment. One count charged respondent with obstruction of justice, in violation of 18 U.S.C. 1503. The other count charged respondent with disclosing a wiretap with the intent of obstructing or impeding it, in violation of 18 U.S.C. 2232(c). The en banc Ninth Circuit reversed the convictions on both counts. App., *infra*, 1a-28a.

1. In 1986 and 1987, as part of a nationwide investigation of health care provider fraud, the San Francisco office of the Federal Bureau of Investigation was investigating Michael Rudy Tham, a convicted former Teamster official, and Abe Chapman, an individual with longstanding criminal ties who was then under indictment. App., *infra*, 3a, 5a, 6a; 7 Tr. 983, 1008. Chapman was a distant relative of respondent; his wife's daughter had at one time been married to respondent's brother. App., *infra*, 3a. On April 12, 1987, the government applied to then-Chief Judge Peckham of the United States District Court for the Northern District of California for authorization to conduct electronic surveillance of Tham's business telephones, pursuant to 18 U.S.C. 2516. The application named Chapman as an individual whose communications were to be intercepted. See 18 U.S.C. 2518(1)(b)(iv). By statute, the wiretap could run for no more than 30 days unless extended, see 18 U.S.C. 2518(5), and it therefore expired on May 20, 1987. App., *infra*, 5a. However, beginning on July 15, 1987, Judge Peckham signed a series of orders postponing the service of notices of the wiretap on the interceptees and maintaining the secrecy of the wiretap through April 25, 1989. 7 Tr. 918-919.

On July 9, 1987, FBI agents saw respondent leave the federal courthouse with Chapman. App., *infra*, 3a, 5a-6a; 7 Tr. 964. On August 5, the FBI advised Judge Peckham that Chapman and respondent had been seen together. App., *infra*, 6a. As Judge Peckham later testified at trial, he warned respondent four days later at an ABA reception "that in the course of a wiretap application that the name Abie Chapman had come up," that Judge Peckham had prosecuted Chapman "in a notorious narcotics" case in 1951, and that Chapman "had been a member of a sinister East Coast criminal organization and that he was convicted and sentenced to a substantial term." 7 Tr. 921. Judge Peckham testified that he spoke to respondent because he was "concerned that * * * associating with a notorious felon would create an appearance of impropriety." 7 Tr. 922. Judge Peckham "feared that Chapman might be going to use the judge's prestige of his office in the furtherance of Chapman's interest." *Ibid*.

Tham wanted to have his prior conviction for embezzlement and making false entries in union records overturned so that he could resume his union activities. After consulting with Chapman and attorney Edward Solomon, who had been a law school classmate of respondent, Tham filed a Section 2255 motion in mid-July 1987, seeking to vacate his prior conviction. Tham, Solomon, and Chapman hoped to use Chapman's and Solomon's ties to respondent to obtain help and advice from respondent with regard to the Section 2255 motion. Chapman and Solomon, who hoped to have respondent influence Judge Weigel, met with respondent and called him periodically with regard to the Section 2255 motion. Respondent checked on the scheduling of the Section 2255 motion, and asked Judge Weigel if a hearing had been set. App., *infra*, 3a-4a.

Meanwhile, the wiretap on Tham's phones began again on September 11, 1987. On October 12, 1987, the wiretap once again expired, but it was reinstituted on October 22, 1987, and subsequently extended through May 8, 1988, when it finally expired. By October, the wiretap was directed in part at investigating the apparent attempt improperly to influence Judge Weigel, and Chapman continued to be named as an interceptee. App., *infra*, 5a. On January 13, 1988, the FBI obtained authorization to expand its electronic surveillance to the telephone of respondent. Gov't Exh. 1B.

The charge that respondent disclosed wiretap information arose out of the events of February 6, 1988. On that date, Chapman visited respondent at his house. As Chapman was leaving, respondent noticed a surveillance unit on the street in front of his house. Respondent immediately called his nephew, Steve, and asked him to come to the house "right now, it's very, very urgent." Tape N-504. Respondent stated that "[i]t'll only take a minute, but it's very important you come here please." *Ibid*. He also told Steve that "I need to get a message to [Chapman], who was just here a minute ago. * * * But I can't talk over the phone." *Ibid*. Steve testified at trial that, upon his arrival at respondent's house, respondent told him that "he recognized a car taking off following Abie [Chapman] and he recognized the driver as an FBI agent." 5 Tr. 824. Respondent also told Steve "that he had overheard at work about the possibility of Abie's phone being wiretapped." 5 Tr. 825. Steve drove to Chapman's house and informed Chapman of those facts. *Ibid*. Later that day, respondent called Steve again and asked him to come to respondent's house. When Steve arrived, respondent asked Steve if he had seen Chapman. Steve assured respondent that he had given the information to Chapman. Respondent ex-

plained that he called Steve over because he "didn't really know what phones were tapped." 5 Tr. 828.

Thereafter, Chapman used an alias ("Dr. Green") when he called respondent. See, e.g., Tape O-1449, O-2022, O-3092. On February 29, 1988, Chapman told Tham that someone "very big" had told him that his phone was tapped. Tape M-1189. Respondent, Chapman, Tham, and Solomon continued to discuss Tham's Section 2255 motion. In conversations with Chapman ("Dr. Green"), respondent discussed Solomon's representation of Tham. On April 20, for example, Chapman called respondent, who requested that Chapman "ask * * * Solomon to call me today." Tape O-6238. Chapman relayed the message to Tham. Tape H-6276. Using an agreed-upon code, Tham gave the message to Solomon. Tape H-6289, H-6299. As Solomon later reported back to Tham, when he called respondent, respondent dictated the language for a motion requesting a hearing on Tham's Section 2255 motion and told Solomon to file it. Tape J-4494. On April 23, 1988, Judge Weigel recused himself from the case. 9 Tr. 1236; Gov't Exh. 16.

On May 17, 1988, respondent and Solomon met for lunch. Solomon was cooperating with the government by this time and was secretly recording the conversation. During lunch, respondent said that he "knew" the FBI was wiretapping Chapman because Peckham had told him. Resp. C.A. Excerpts of Rec. 6. Respondent made quite clear that he believed that Chapman's telephone was "definitely tapped," *id.* at 17, and respondent admitted that he "told [his] nephew" and said to the nephew "I want you to tell him not over the phone," but to "get to his house and tell him." *Id.* at 18. Respondent also stated that

once I found out that they were tapping the guy's phone the first thing I ask him, where are you calling me from? The pay phone. See I can hear the traffic.

It's okay. What do you want? I wouldn't talk to him any other time. One time he called me I said where you calling me from?" Marilyn's house. I said well I'm busy right now you'll have to call me some other time.

Id. at 22-23. Respondent also told Solomon to tell authorities that "I [respondent] had nothing to do with you regarding this case," *id.* at 10, and that, if Solomon needed to call respondent at his chambers, he should "just say on, over the phone just say to me god I ran into some of our . . . our classmates" and "we oughta have lunch together." *Id.* at 34. Finally, he told Solomon that, if asked concerning his contact with Solomon, he was going to claim Solomon asked for advice about a "wrongful discharge" case. *Id.* at 26. At the end of the lunch, respondent stated, "As far as I'm concerned we discussed a wrongful termination case." *Id.* at 35.

The obstruction of justice count arises from a secretly recorded interview with respondent conducted on June 22, 1988, by Agent Carlon and another agent of the FBI. The two agents visited respondent and informed respondent that there had been an allegation that, at Chapman's request, respondent had "attempted to intervene" in Tham's Section 2255 motion. Resp. C.A. Excerpts of Rec. 57.

Respondent made a number of false statements to the agents. For example, respondent stated that he had found out "recently" that Solomon was Tham's lawyer. Resp. C.A. Excerpts of Rec. 62. He stated that he "simply didn't discuss" the Tham case with Solomon, *id.* at 64, even when the two had had lunch together. *Id.* at 62. See also *id.* at 69 ("I never discussed it with Solomon."). He said that Solomon had asked him "how to proceed on a um wrongful termination or employment discrimination" case. *Id.* at 66.

Agent Carlon informed respondent that Chapman had been observed leaving his house to make calls from a pay phone and then immediately returning home. Carlon stated his view that Chapman was acting like those who "suspect perhaps that their phones are tapped." Resp. C.A. Excerpts of Rec. 70. Respondent replied, "Well he can't have learned that from me because I don't . . . I don't know anything about that." *Id.* at 71. Respondent also denied that he had "ever f[ou]nd out or learn[ed] of any wire tap order on Abe Chapman." *Ibid.* See also *id.* at 72. At the conclusion of the interview, respondent returned to the subject of his conversations with Chapman and stated:

As you can see my conversations with him aren't very long, you know, and my and my visits with him aren't very long. He'll call me and say well I saw your mother and father and they're fine goodbye.

Id. at 79. At that point, the transcript indicates "(laughter)," followed immediately by respondent's adding: "And that's it." *Ibid.*

Early in the interview, respondent asked whether he was "some kind of target" of the investigation and stated that he "assume[d] from this * * * that I very likely am if I've done anything wrong." Resp. C.A. Excerpts of Rec. 57. Agent Carlon responded, "Yeah." *Ibid.* Later, respondent asked again if he was a target. *Id.* at 73. Agent Carlon stated that "certainly some of this evidence is pointing in your direction and I'd have to say yes * * * there is a grand jury meeting" and that "some evidence will be heard I'm . . . I'm sure on this issue." *Ibid.* Later, respondent again said that he was "concerned" that a grand jury would meet "to determine whether or not they should return some indictment * * * against me for obstructing justice." *Id.* at 74.

2. On June 13, 1989, an eight-count indictment was returned against respondent, Tham, and Chapman. Respondent was charged with conspiring to defraud the United States and to endeavor to obstruct justice, in violation of 18 U.S.C. 371; four counts of endeavoring to obstruct justice, in violation of 18 U.S.C. 1503; two counts of illegally disclosing a wiretap application, in violation of 18 U.S.C. 2232(c); and one count of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c). On March 19, 1990, a jury acquitted respondent on one count of obstructing justice and deadlocked on the remaining counts against respondent and the other defendants. App., *infra*, 4a, 30a.

The cases were severed, and the trial court granted the government's motion to dismiss the RICO count and one of the obstruction of justice counts against respondent. After a retrial on the remaining counts, respondent was found guilty of one count of obstruction of justice and one count of illegally disclosing a wiretap application. He was acquitted on the remaining counts. Respondent was sentenced to concurrent sentences of six months' imprisonment and ordered to pay a \$2,000 fine. See App., *infra*, 30a, 106a. Meanwhile, Tham was convicted in a separate trial of conspiracy and one count of obstruction of justice. See *United States v. Tham*, 960 F.2d 1391 (9th Cir. 1991). Chapman pleaded guilty to the conspiracy charge. See *id.* at 1393 n.1.

3. A divided panel of the Ninth Circuit affirmed in part and reversed in part. App., *infra*, 29a-113a. The result hinged on the adequacy and effect of the knowledge instruction given to the jury, which was derived from the Model Penal Code's definition of knowledge. Judge Hall found the knowledge instruction correct, and would have affirmed the convictions on both counts. *Id.* at 31a-57a. Judge Hug believed that the knowledge instruction was in-

correct, that the error was not harmless as to either count, and that both counts were defective for other reasons as well. He would therefore have reversed the convictions on both counts. App., *infra*, 65a-101a. Judge O'Scannlain agreed with Judge Hug that the knowledge instruction was incorrect, but he viewed that error to be harmless as to the wiretap disclosure count. *Id.* at 102a-113a. Accordingly, the panel affirmed respondent's conviction on the wiretap disclosure count and reversed his conviction on the obstruction of justice count. *Id.* at 30a-31a.

The panel also remanded the case to the district court for resentencing, holding that the district court had failed to provide a reasoned explanation of its downward departure at sentencing. App., *infra*, 30a-31a, 106a-113a.

4. On rehearing en banc, the Ninth Circuit reversed respondent's convictions on both counts. App., *infra*, 1a-28a. The court did not reach the question whether the knowledge instruction was adequate or, if not, whether giving that instruction was harmless error.

With respect to the obstruction of justice count, the court observed that this prosecution was brought under the so-called "omnibus clause" of Section 1503, which makes it an offense to "corruptly or by threats or force, or by any threatening letter or communication, influence[], obstruct[], or impede[], * * * the due administration of justice." 18 U.S.C. 1503. The court held that "the conduct charged in the indictment and found by the jury does not constitute a violation of" that clause. App., *infra*, 16a. In the court's view, Congress had implicitly narrowed the broad language of the omnibus clause when it enacted and later amended another statute, 18 U.S.C. 1512. App., *infra*, 19a-22a.

Specifically, the court observed that attempts to obstruct justice by influencing a witness were originally

covered by Section 1503. In 1982, Congress had removed all references to witnesses when it enacted 18 U.S.C. 1512, a new offense directed toward corruptly influencing witnesses. Then, in 1988, Congress had amended Section 1512 in turn to make clear that it extended not only to coercion of witnesses, but also to non-coercive witness tampering, in which the defendant "corruptly persuades [a witness] * * * or attempts to do so." 18 U.S.C. 1512. The court acknowledged that the 1988 legislation did not alter Section 1503 and that it was enacted five months after the conduct at issue here. App., *infra*, 21a. But the court held that the 1988 legislation nonetheless "indicates that the conduct [claimed to be in violation of Section 1503] must involve a defendant who 'corruptly persuades . . . or attempts to [persuade]' a witness so as to influence his testimony." App., *infra*, 22a. Since respondent was charged with obstructing the grand jury's investigation by making false and misleading statements to the FBI agents, and not by attempting to "corruptly persuade" them to testify falsely before the grand jury, the court concluded that no Section 1503 offense had been charged or proven in this case. App., *infra*, 22a-25a. The court also found support for its conclusion in the rule of lenity, and in the Fifth Amendment concerns that would in its view result from "[c]onstruing section 1503 so broadly as to cover making false and misleading statements to FBI agents." App., *infra*, 24a.

With respect to the wiretap disclosure count, the court held that the statute under which respondent was charged does not prohibit disclosure of wiretaps if the authorization of which the defendant had knowledge had expired at the time the defendant made the disclosure. In the court's view, "[t]he plain language of the statute makes it clear that the purpose of the statute is to prevent interference with 'possible interception.'" App., *infra*, 9a. Although

interference with possible interception could result from disclosure of a pending wiretap application or from disclosure of a still-active authorization, the court stated that "disclosure of an application that already has been denied, or whose authorization already has expired, cannot possibly interfere with 'such interception.'" *Ibid.* In reaching that conclusion, the court added that its analysis of the statute was supported once again by the rule of lenity, App., *infra*, 9a-10a, and by the "substantial" impact on First Amendment interests that it believed could result from interpreting the statute to "bar[] disclosure of a wiretap application many months or years after the fact." *Id.* at 11a.

Judge Fernandez, joined by Chief Judge Wallace, dissented from the court's reversal of the conviction on the wiretap disclosure count. In Judge Fernandez's view, the plain language of the statute requires the government to prove only "that [respondent] knew that a wiretap had been applied for; that [respondent] intended to obstruct or impede the interception for which the application was designed to obtain authorization; and that [respondent] gave or attempted to give notice of the possible interception." App., *infra*, 25a. Judge Fernandez explained that, because the evidence was more than adequate to prove those three elements, the conviction for a violation of Section 2232(c) should be affirmed. In Judge Fernandez's view, so long as respondent "attempt[ed] to give a notice that would interfere with a wiretap," the fact that the wiretap of which he had notice had expired was of no relevance. App., *infra*, 26a.

REASONS FOR GRANTING THE PETITION

The court of appeals substantially narrowed the scope of the omnibus clause of 18 U.S.C. 1503, largely in

reliance on an amendment to another statute that was enacted five months after the events in this case. Because the court's unduly narrow reading of Section 1503 directly conflicts with a decision of the Fourth Circuit in a virtually identical factual setting, review is warranted. In addition, although the court of appeals' decision with respect to 18 U.S.C. 2232(c) does not conflict with any decision of any other court of appeals, review of that issue is warranted as well. The court of appeals' decision unjustifiably and dramatically limits the scope of an important federal criminal statute (albeit one that, because individuals entrusted with confidential wiretap information have rarely violated the confidence reposed in them, has generated few prosecutions). In light of the intertwined nature of the two charges at issue in this case and the importance of this prosecution, it would be appropriate for the Court to review both aspects of this case.

1. a. Under the "omnibus clause" of 18 U.S.C. 1503, it is a crime to

corruptly or by threats or force, or by any threatening letter or communication, influence[], obstruct[], or impede[], or endeavor[] to influence, obstruct, or impede, the due administration of justice.

Proof of a violation of the offense defined by that clause requires proof that: "(1) there must be a pending judicial proceeding; (2) the defendant must have knowledge or notice of the pending proceeding; and (3) the defendant must have acted corruptly with the specific intent to obstruct or impede the proceeding in its due administration of justice." *United States v. Williams*, 874 F.2d 968, 977 (5th Cir. 1989); see also *United States v. Barfield*, 999 F.2d 1520 (11th Cir. 1993); *United States v. Biaggi*, 853 F.2d 89, 104 (2d Cir. 1988), cert. denied, 489 U.S. 1052 (1989). Among the proceedings protected by the statute

are grand jury proceedings. See, e.g., *United States v. Capo*, 791 F.2d 1054, 1070 (2d Cir. 1986); *United States v. Simmons*, 591 F.2d 206 (3d Cir. 1979); *United States v. Howard*, 569 F.2d 1331 (5th Cir.), cert. denied, 439 U.S. 834 (1978).

When viewed in the light most favorable to the government (as verdicts of guilty require), the evidence in this case was ample to establish all of those elements. It was undisputed that there was a pending grand jury proceeding at the time of respondent's interview with the FBI agents on June 22, 1988. Moreover, the transcript of that interview was more than sufficient, taken by itself and without regard to other evidence of respondent's knowledge, to establish that respondent knew of the pending proceeding. See pp. 7-8, *supra*. Indeed, respondent testified at trial that, by the end of the interview, he knew that his statements would be reported to the grand jury. 9 Tr. 1359-1361. The court of appeals acknowledged that the jury in this case "found that [respondent], as a target of the investigation, made false and misleading statements to the FBI agents, minimizing his involvement with Chapman and attorney Solomon." App., *infra*, 16a-17a. When committed with the necessary intent, that kind of conduct had been found sufficient in a variety of settings to constitute a corrupt endeavor to obstruct the due administration of justice. See, e.g., *United States v. Langella*, 776 F.2d 1078 (2d Cir. 1985) (testifying falsely before grand jury and concealing evidence), cert. denied, 475 U.S. 1019 (1986); *United States v. Nelson*, 852 F.2d 706, 711-712 (3d Cir.) (alteration of documents), cert. denied, 488 U.S. 909 (1988); *United States v. McComb*, 744 F.2d 555, 559 (7th Cir. 1984) (same); *United States v. Faudman*, 640 F.2d 20, 23 (6th Cir. 1981) (same); *United States v. Shoup*, 608 F.2d 950, 959-963 (3d Cir. 1979) (submission to U.S. At-

torney of misleading report, the contents of which would be given to grand jury); *United States v. Griffin*, 589 F.2d 200 (5th Cir.) (false testimony before a grand jury), cert. denied, 444 U.S. 825 (1979); *United States v. Walasek*, 527 F.2d 676, 679-680 (3d Cir. 1975) (withholding or destroying documents). But cf. *United States v. Essex*, 407 F.2d 214 (6th Cir. 1969) (false statements before grand jury not covered by omnibus clause of Section 1503). See also cases cited pp. 18-20, *infra*.

b. The Ninth Circuit did not dispute the above conclusions. Instead, the court adopted a special requirement for cases in which the defendant is charged with endeavoring to obstruct a grand jury investigation by means of conduct directed toward a prospective grand jury witness.¹ In cases of that sort, the court held, the conduct may be prosecuted under Section 1503 only if it can be characterized as an attempt at "corrupt influence" or "corrupt persuasion" of

¹ The jury was instructed that it was respondent's effort to obstruct the grand jury investigation through false statements to a prospective witness, not his effort to obstruct an FBI investigation, that was at issue:

Now, keep in mind, members of the jury, the agents of the Federal Bureau of Investigation they do not work for the grand jury, they're not employees of the grand jury, they're a separate agency and they investigate. You've heard—we had a witness, Mrs. Ellington I believe, describe a little bit about how the grand jury functions.

The thrust of this count is not that he lied to the FBI because that's not a violation of a particular law we're concerned with here. We're concerned with whether or not, whatever was done whether FBI people or not, whether or not he was shown by the evidence by the standard I've mentioned to have known that a grand jury was ongoing and that he endeavored in those interviews, whether the FBI people or not, to in some way impede, interfere with or obstruct the functioning of that grand jury.

10 Tr. 1532-1533.

the witness. App., *infra*, 22a. In the court's view, although "threats, force, bribery, [or] extortion" would satisfy that requirement, *id.* at 23a, "making a false statement to a potential witness" would not. *Id.* at 22a. Applying its freshly minted requirement to the facts of this case, the court found that respondent's endeavor to obstruct and impede the grand jury was not prohibited by the omnibus clause of Section 1503.

The court based the rationale for its decision on what it believed to be congressional intent, as revealed in a series of enactments in the 1980s. Specifically, the court noted that Section 1503 had originally included explicit references to witness tampering, but that all such references had been removed when Congress enacted a statute specifically addressing witness tampering (now codified at 18 U.S.C. 1512) in 1982. App., *infra*, 19a-20a. The court then noted that in 1988—some five months after the conduct at issue in this case—Congress had amended Section 1512 to make clear that it covered "non-coercive" witness tampering. App., *infra*, 20a-21a. The court stated that, in its view, respondent's conduct could not have been charged under the amended Section 1512.² App., *infra*, 22a-24a. The court therefore concluded that Congress intended that respondent's conduct not be charged under Section 1503, either. App., *infra*, 23a-24a.

The court's reasoning is erroneous. Throughout the period discussed by the court of appeals, the portion of Section 1503 under which respondent was charged—the omnibus clause—remained unchanged. The logical conclusion to be drawn is that Congress intended to leave the substantive scope of the omnibus clause untouched. To be

² That conclusion is in itself highly doubtful, since respondent would certainly appear to have "engage[d] in misleading conduct toward another person, with intent to * * * influence * * * the testimony of any person in an official proceeding." 18 U.S.C. 1512(b)(1).

sure, Congress did undoubtedly create an offense in Section 1512 to address the problem of witness tampering. Respondent, however, was not charged with witness tampering, but with endeavoring to obstruct a grand jury proceeding. The court of appeals' conclusion that his conduct would not have constituted a violation of Section 1512 does not provide any basis for the court's conclusion that his conduct did not violate Section 1503.

Although Congress's enactment and amendment of Section 1512 was the primary basis for the court's construction of Section 1503, the court also briefly appealed to what it viewed as Fifth Amendment concerns that would be raised by "[c]onstruing section 1503 so broadly as to cover making false and misleading statements to FBI agents." App., *infra*, 24a. Had respondent invoked his Fifth Amendment rights and refused to speak with the FBI agents, his conduct would no doubt be constitutionally protected. Although the Fifth Amendment protects an individual's right to remain silent, it does not protect his right to obstruct grand jury proceedings through calculated false statements. See, e.g., *Bryson v. United States*, 396 U.S. 64, 72 (1969) ("A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood."); *United States v. Rodriguez-Rios*, 14 F.3d 1040, 1049-1050 (5th Cir. 1994) (en banc). Accordingly, the Fifth Amendment privilege provides no basis for the court of appeals' limitation of the scope of Section 1503.

Nor does the rule of lenity, upon which the court of appeals also relied, see App., *infra*, 24a-25a, support its holding in this case. As this Court has repeatedly cautioned, "[t]hat maxim of construction is reserved for cases where, after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute." *Staples v. United States*, 114 S. Ct. 1793, 1804 n.17 (1994)

(internal quotation marks and brackets omitted). The broad language of the omnibus clause of Section 1503 leaves no room for ambiguity concerning any issue in this case. Accordingly, the rule of lenity does not apply.

c. The decision of the court of appeals directly conflicts with the Fourth Circuit's decision in *United States v. Grubb*, 11 F.3d 426 (1993). In that strikingly similar case, a state court judge who was involved in a scheme to give a government job to a supporter of a political ally was prosecuted for lying to an FBI agent about what he had done. When asked about the events by the agent, the judge made false and misleading statements while denying crucial details of the scheme. See 11 F.3d at 431, 437-438. The judge was prosecuted under Section 1503 for "endeavor[ing] to influence, obstruct and impede the Grand Jury Investigation * * * by making false and misleading statements to the FBI concerning his involvement" in the matter under investigation. 11 F.3d at 436 n.15. The Fourth Circuit held that, so long as the government proved that the defendant knew of the pending grand jury proceeding and "acted corruptly, that is with the intent to influence, obstruct, or impede that proceeding," he was correctly charged under Section 1503. 11 F.3d at 437.

At the time that the Fourth Circuit decided *Grubb*, the Ninth Circuit had not yet filed its en banc decision in this case. But the Fourth Circuit was well aware of the rationale that the Ninth Circuit employed in this case. For the Fourth Circuit cited Judge Hug's panel opinion in this case and briefly described its reasoning.³ See 11 F.3d at

³ The Fourth Circuit cited "*United States v. Aguilar*, 994 F.2d 609, 637 (9th Cir.)." Page 637 of the reported panel decision is the first page of Judge Hug's discussion of the obstruction of justice count in this case. See App., *infra*, 92a.

437 n.20. Judge Hug later employed essentially identical reasoning in his opinion for the en banc court with respect to the Section 1503 issue. Compare App., *infra*, 92a-100a (panel opinion) with App., *infra*, 15a-25a (en banc opinion). In addition, the Fourth Circuit noted that, though the two cases were "factually similar," the Ninth Circuit had concluded that no Section 1503 violation had been made out. 11 F.3d at 437 n.20. Yet, although the Fourth Circuit was fully aware of the factual similarity of the cases and the reasoning by which the Ninth Circuit concluded that those facts were insufficient to support a conviction under Section 1503, the Fourth Circuit nonetheless reached the opposite conclusion and upheld the Section 1503 conviction in *Grubb*. This conflict in the circuits concerning the criminality of essentially identical conduct by two sitting judges calls for this Court's review.

Other courts of appeals have also affirmed convictions under Section 1503 for making false statements to FBI agents in an attempt to obstruct a grand jury investigation, although they have not directly addressed the argument upon which the Ninth Circuit based its decision in this case. See, e.g., *United States v. Hawkins*, 765 F.2d 1482, 1489 (11th Cir. 1985), cert. denied, 474 U.S. 1103 (1986); *United States v. Haldeman*, 559 F.2d 31, 128-129 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). Cf. *United States v. Shoup*, 608 F.2d 950, 962-963 (3d Cir. 1979) (submission of false and misleading report to U.S. Attorney with knowledge that information in it would be provided to the grand jury). Those decisions are inconsistent on their facts with the Ninth Circuit's decision in this case.⁴

⁴ Other courts have affirmed Section 1503 convictions in other contexts based on unsworn false statements. See, e.g., *United States v. Barfield*, 999 F.2d 1520, 1524 (11th Cir. 1993); *United States v. Barber*, 881 F.2d 345, 351 (7th Cir. 1989), cert. denied, 495 U.S. 922 (1990).

Although one other court has held that a Section 1503 violation based on unsworn false statements to an FBI agent could not be made out, that court appears to have based its decision on the specific facts of the case and not to have generally curtailed the scope of Section 1503 as did the Ninth Circuit here. In *United States v. Wood*, 6 F.3d 692 (10th Cir. 1993), the defendant made false statements to FBI agents who were assisting in a grand jury investigation; the statements concerned the circumstances under which he loaned an automobile to an official who was suspected of political corruption. The Tenth Circuit held that the defendant's conduct did not violate Section 1503, because the agents "would not expect a full confession in the context of an unsworn interview" and the defendant's self-serving false statements did not have "the natural and probable effect of impeding the grand jury investigation." 6 F.3d at 696.

The Ninth Circuit did not purport to rely on *Wood* in its decision in this case and, as we read it, the Tenth Circuit's decision in *Wood* lends no support to the Ninth Circuit's result. Unlike the Ninth Circuit in this case, the Tenth Circuit in *Wood* did not adopt a general rule that would preclude all Section 1503 prosecutions based on unsworn false statements to potential grand jury witnesses. Instead, the Tenth Circuit simply relied on its analysis of the facts of the case before it, which revealed that, in the Tenth Circuit's view, the particular false statements at issue would be unlikely to have the effect of impeding an investigation. The Ninth Circuit did not rely on any such conclusion about the facts of this case, and the evidence in this case would not support a reversal based on that theory.

2. The Ninth Circuit also adopted a seriously erroneous interpretation of 18 U.S.C. 2232(c), the wiretap disclosure statute. That statute provides in relevant part:

Whoever, having knowledge that a Federal investigative or law enforcement officer has been

authorized or has applied for authorization under chapter 119 [of Title 18] to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under [Title 18] or imprisoned not more than five years, or both.

The plain language of the statute requires proof that (1) the defendant knew that a federal officer had been authorized to intercept a wire communication or had applied for authorization; (2) the defendant intended to obstruct, impede, or prevent the interception for which authorization had been given or application had been made; and (3) the defendant gave notice or attempted to give notice of the possible interception.

The evidence in this case was sufficient to establish those elements. Judge Peckham testified that, because he "feared that Chapman might be going to use the [respondent's] prestige of his office in the furtherance of Chapman's interest," 7 Tr. 922, he informed respondent "that in the course of a wiretap application that the name Abie Chapman had come up." 7 Tr. 921. Respondent took action based on that knowledge several months later, when he saw Chapman being photographed leaving respondent's home. As he later explained to Solomon, he "knew" the FBI was wiretapping Chapman because Peckham had told him. Resp. C.A. Excerpts of Rec. 6. And respondent admitted to Solomon that he "told [his] nephew" and said to the nephew "I want you to tell him [Chapman] not over the phone," but to "get to his house and tell him." *Id.* at 18. As the dissenting opinion remarked, "[i]t cannot be doubted that [respondent] conveyed information to Chapman with the intent to impede interception." App., *infra*, 26a.

In ruling that respondent's conduct did not violate Section 2232(c), the court of appeals interpreted the statute to require proof that the precise application or authorization of which the defendant had knowledge was still pending or unexpired at the time the defendant made the disclosure. The court reasoned that "[t]he plain language of the statute makes it clear that the purpose of the statute is to prevent interference with 'possible interception,' " and that no such interference is possible where the application "has been denied" or the authorization "already has expired." App., *infra*, 9a. In those circumstances, the court held, Section 2232(c) imposes no limit on the defendant's disclosure of wiretap information—even if (as here) the defendant believes that the wiretap is in effect at the time he makes the disclosure and a reauthorized wiretap is in fact in effect.

The effect of the court of appeals' opinion is to impose an unjustified and arbitrary limit of 30 days or less on the protection afforded by Section 2232(c). Under 18 U.S.C. 2518(5), wiretaps may be authorized or extended for a maximum period of 30 days, and the government is obligated to minimize its interception of wire communications. See 18 U.S.C. 2518(5). Accordingly, it is quite common for wiretaps to be authorized, extended, terminated, and re-authorized in the context of overlapping or continuing criminal investigations.⁵ Under the court of appeals' decision, an individual who, for example, obtains knowledge of a particular authorization toward the end of the 30-day period and discloses it to a target of the interception after the 30-day period has expired in an effort to prevent the interception would be immune from prosecution. Even an

⁵ The wiretap at issue in this case was authorized, terminated, reauthorized, terminated again, reauthorized again, and then extended for a period of months. See App., *infra*, 5a.

individual who obtained knowledge of the authorization at its inception could disclose it to the targets without fear of prosecution so long as he waited 30 days to do so.

The court of appeals' construction is neither required by the statutory language nor suggested by Congress's purpose in enacting the statute. The plain language of the statute requires proof of two mental elements and one physical act in order to prove a violation. The mental elements are knowledge of an application or authorization, and intent to obstruct the interception that would result from that application or authorization. The physical act is the defendant's giving notice or attempting to give notice of the possible interception. Nothing in the statute requires proof that the defendant be shown to have succeeded in obstructing the interception of a wire communication, and there is no basis in the statutory language for the court of appeals' requirement that such obstruction be possible at the time the disclosure was made.

When it enacted the statute, Congress understood it to prohibit disclosures of applications or authorizations, regardless of whether they were pending, in operation, or expired at the time of the disclosure. The Senate committee report stated in entirely general terms that the provision "makes it a criminal act * * * to warn any person that a Federal agency or law enforcement officer has been authorized or has sought authorization * * * to intercept a wire, oral, or electronic communication." S. Rep. No. 541, 99th Cong., 2d Sess. 34 (1986). The committee then recited the "elements" of the offense much as we listed them above. *Ibid.* Significantly, among those were that "[t]he defendant must engage in conduct of giving notice of the possible interception to any person who *was or is* the target of the interception." *Ibid.* (emphasis added). That language makes clear that Congress understood that disclosure of wiretap information even to an individual

who is no longer a target of the tap is prohibited. The report also stated that "[t]he offense also includes an attempt to engage in the offense," *ibid.*, indicating that the fact that the disclosure did not or could not have actually interfered with the interception is of no consequence. The House committee report included substantially identical language. H.R. Rep. No. 647, 99th Cong., 2d Sess. 60-61 (1986).

The court of appeals suggested that the rule of lenity and First Amendment considerations support its limiting interpretation. See App., *infra*, 9a-10a, 11a-12a. As with the obstruction statute, however, resort to the rule of lenity is inappropriate because the language and the intent of Section 2232(c) are unambiguous. Nor does the construction of the statute we advocate raise a substantial First Amendment concern. Under any construction, the statute limits some disclosure of information that could be of public interest. But the statute only prohibits disclosures made with the intent to impede or obstruct a possible interception. Where the disclosure is not made with that intent — *e.g.*, where the intent is "to correct past government misconduct and to avert similar abuses of power in the future," by disclosing "politically-motivated wiretaps, such as those that occurred at the height of the civil rights movement," App., *infra*, 11a-12a — the defendant could not be prosecuted under Section 2232(c). Moreover, it has long been settled that the government may prohibit individuals in a position of confidence, such as respondent, from disclosing confidential information that they receive in their official capacity. See, *e.g.*, *Snepp v. United States*, 444 U.S. 507, 511 & n.6 (1980) (*per curiam*). Indeed, the grand jury secrecy requirement of Fed. R. Crim. P. 6(e) is based on essentially the same rationale as Section 2232(c), and it is enforceable through a criminal contempt sanction or, in an appropriate case, a prosecution for obstruction

of justice. See, *e.g.*, *United States v. Jeter*, 775 F.2d 670, 677-678 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986) (rejecting argument that First Amendment provides defense to charge of obstructing justice by violating Rule 6(e)); *United States v. Howard*, 569 F.2d 1331, 1336 (5th Cir.), cert. denied, 439 U.S. 834 (1978).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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AUGUST 1994

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Nos. 90-10597, 91-10024

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE-CROSS-APPELLANT

v.

ROBERT P. AGUILAR,
DEFENDANT-APPELLANT-CROSS-APPELLEE

Appeal from the United States District Court
for the Northern District of California

Argued and Submitted Nov. 18, 1993
Decided April 19, 1994

Before: WALLACE, Chief Judge, HUG, TANG, FARRIS,
PREGERSON, NORRIS, REINHARDT, BRUNETTI, KOZINSKI,
LEAVY, and FERNANDEZ, Circuit Judges.

HUG, Circuit Judge:

I.

OVERVIEW

The appellant, United States District Judge Robert Aguilar, was charged with five criminal violations. Trial was held on August 1, 1990. He was acquitted of three of the charges, and convicted of two. The convictions were for illegally disclosing a wiretap in violation of 18 U.S.C. § 2232(c), and endeavoring to obstruct justice in violation of 18 U.S.C. § 1503. The appellant was sentenced to two six-month terms of imprisonment, to be served concurrently, and fined \$2,000. Judge Aguilar appeals his convictions on both counts, and the Government appeals his sentence.

The central question in this case is whether Judge Aguilar's conduct, as charged in the indictment and found by the jury, violated the criminal statutes on which his convictions are based. We find that the statutes do not apply to the conduct at issue in this appeal, and we therefore reverse the convictions.¹

II.

BACKGROUND

The genesis of the charges against Judge Aguilar was an effort by Rudy Tham, Abraham Chapman, and Edward Solomon to have Tham's 1980 conviction for embezzlement set aside.

¹ Judge Aguilar challenges his convictions on other grounds besides the inapplicability of the statutes. He asserts that the evidence was insufficient to prove that he satisfied the knowledge requirement of either statute, and that the definition of knowledge contained in the jury instructions was erroneous. Since we reverse his convictions because the statutes do not apply to the conduct found by the jury, we have no need to reach the other issues.

Tham was a former union official for San Francisco Teamsters Local 856. He had been an active leader of Local 856 until his conviction on May 21, 1980, for embezzlement and making false entries into union records. District Judge Stanley A. Weigel presided over the trial. Tham desired to have his conviction overturned so that he could resume his union activity. In this regard, Tham sought the assistance of attorney Edward Solomon, and a friend, Abraham Chapman.

Solomon is an attorney whose office was located in the same building as Local 856. Twenty to thirty percent of Solomon's work came from referrals by Tham. Solomon had attended Hastings College of the Law with Judge Aguilar and was an acquaintance of the Judge.

Chapman, an 83 year-old man, was married to Mrs. Josephine Knaack ("Mrs. Knaack"), a longtime friend of the Aguilar family, whose daughter, Marilyn, had married Judge Aguilar's brother. Judge Aguilar had met Chapman at several family functions.

Solomon began working on setting aside Tham's conviction in 1987. He advised Tham that the best way to get his conviction overturned would be by filing a petition for habeas corpus under 28 U.S.C. § 2255. The petition was filed and scheduled to be heard by Judge Weigel. In an effort to enhance the chances for success, Tham, Solomon, and Chapman sought to utilize Chapman's and Solomon's ties to Judge Aguilar to solicit help and advice from Judge Aguilar. They hoped to have Judge Aguilar influence Judge Weigel in his decision on Tham's petition.

Chapman arranged a meeting between Judge Aguilar and Solomon on September 12, 1987. At the meeting, Judge Aguilar reviewed the petition and advised Solomon to seek an evidentiary hearing. After this meeting, Solomon and Chapman, at the urging of Tham, periodically called Judge Aguilar, asking him to check on the

scheduling and status of the petition and the hearing. Judge Aguilar complied with the request and twice checked the court calendar to see if the hearing had been set, and once asked Judge Weigel if a hearing had been set. It is within this framework that Judge Aguilar became intertwined with Tham, Chapman, and Solomon.

In the course of investigating Tham and Chapman on unrelated matters, the FBI became aware of Tham's efforts regarding his habeas petition, and the conversations Chapman and Solomon had with Judge Aguilar. The FBI began an investigation into the events regarding Tham's habeas petition and the possible illegal attempt to influence Judge Weigel.

This investigation led to several charges being presented to the grand jury against Tham, Chapman, and Judge Aguilar, and on June 13, 1989, they were indicted.² In the initial trial, the three persons were tried together. This ended in a hung jury and a consequent mistrial.

Judge Aguilar was then tried separately on five counts. The charge that was the principal focus of the trial was that Judge Aguilar had participated in a conspiracy to impede criminal investigations and to influence Judge Weigel in his decisions concerning Tham's section 2255 petition. Judge Aguilar testified that he was only advising Solomon and Chapman as to how to get the matter before the court procedurally. Judge Weigel testified that Judge Aguilar did not in any way attempt to influence him in his ruling on Tham's section 2255 petition. Judge Aguilar was acquitted of the conspiracy charge and on two other charges. The jury found Judge Aguilar guilty on the two remaining charges.

² In exchange for his cooperation with the Government, Solomon was not prosecuted.

Judge Aguilar was convicted on a charge of disclosing a wiretap application and a charge of attempting to obstruct justice. The nexus of these charges stems from specific incidents that occurred during the investigation relating to Tham's petition. We now turn to an analysis of the specific charges of which Judge Aguilar was convicted, and the facts involved in those charges.

III.

WIRETAP CHARGE

A. Facts

The events that led to the charge of illegal disclosure of a wiretap application are as follows.

Throughout the time that Tham was attempting to have his conviction set aside he was being investigated by the FBI as a part of a nationwide probe into health care provider fraud. On April 12, 1987, the FBI applied to then-Chief United States District Judge Robert Peckham for authorization to conduct electronic surveillance of Tham's business telephones. The application named Chapman as a potential interceptee of the wiretap.

On April 20, 1987, Judge Peckham signed an order authorizing the wiretap. The wiretap expired on May 20, 1987, and on May 21, Judge Peckham signed an order terminating the wiretap. The April 20 wiretap was never extended. Other wiretaps were authorized for which Chapman was an interceptee from September 11 to October 12, 1987, and from October 22, 1987, which was extended through May 8, 1988, by applications pursuant to 18 U.S.C. § 2518(5).

During this time, the Department of Justice of the State of California was conducting surveillance of Chapman on unrelated matters. On July 9, 1987, a state agent photo-

graphed Chapman walking out of the San Jose Federal Building with Judge Aguilar. The state agent notified the FBI. The FBI and the state agent then observed Judge Aguilar and Chapman eating lunch together.

As Chief Judge of the Northern District of California, Judge Peckham had an interest in maintaining the integrity of the court and in being informed of any matter which could damage the court's reputation. He had an arrangement with the FBI Special Agent in Charge that the agent would report to Judge Peckham any perceived improprieties occurring within the Northern District Court. Thus, on August 5, 1987, FBI Special Agent in Charge, Richard Held, informed Judge Peckham that in the course of investigating Abe Chapman, Judge Aguilar had been observed in the company of Abe Chapman. The agent informed Judge Peckham that there was no indication that Judge Aguilar was implicated in any criminal activity, or that Judge Aguilar was a subject of the investigation.

On August 9, Judge Peckham ran into Judge Aguilar at an American Bar Association reception in San Francisco. The two discussed the San Jose court calendar. Judge Peckham then told Judge Aguilar that, "in the course of a wiretap application that the name Abie Chapman had come up and that [when he] had been a United States Attorney in 1951 that Abie Chapman had been prosecuted in a notorious drug case." Judge Peckham did not tell Judge Aguilar whose phone was to be tapped or whether Chapman was a person whose messages were to be intercepted. Judge Peckham testified that his intent in telling this information to Judge Aguilar was to let Judge Aguilar know that associating with Chapman could create the appearance of impropriety. Judge Aguilar responded that he knew the old man, and laughed because the Abe Chapman he knew was "a senile little old man who waddled when he walked."

Judge Aguilar and Judge Peckham did not discuss Chapman or any wiretap after August 9.

Judge Aguilar testified that on February 6, 1988, Abe Chapman stopped by his house to drop off a box of sausage on behalf of Mrs. Knaack. Chapman stayed for about 10 minutes and had two brandies. Judge Aguilar walked Chapman to his car. At the car, Judge Aguilar noticed across the street a man who appeared to be conducting surveillance and taking pictures of him and Chapman. Judge Aguilar suspected the man was with the police or the FBI. Chapman then drove off almost causing an accident with two cars, one that came to a screeching halt and one that drove over the curb to miss Chapman. The car conducting surveillance followed Chapman.

The incident caused Judge Aguilar a good deal of concern. He then called his nephew, Steve Aguilar, and asked him to come over. Judge Aguilar knew that Chapman was next going to Steve's mother's house to make a delivery. He told Steve of his concerns about Chapman's driving and stated that he had heard as a fluke at work that phones were being tapped. He asked Steve to go to his mother's house and personally tell Chapman about his concerns and not to come around or call him any more. Steve went to his mother's house and conveyed the message to Chapman in person, and stated that Judge Aguilar had mentioned that Chapman's phone might be tapped. Judge Aguilar was mistaken in his belief that Chapman's phone was tapped. There was no evidence of there ever having been an application or an order authorizing a wiretap on Chapman's phone.

It is from the events of February 6, 1988, that Judge Aguilar was charged and convicted of improperly disclosing a wiretap pursuant to 18 U.S.C. § 2232(c). For the following reasons, we hold that these facts do not constitute an offense under section 2232(c).

B. *The Scope of 18 U.S.C. § 2232(c)*

Judge Aguilar was convicted of Count VI, which charged the following:

On or about February 6, 1988, in the Northern District of California, defendant, Robert P. Aguilar while a United States District Judge, having knowledge that a Federal investigative officer had applied to the United States District Court for the Northern District of California for authorization to intercept wire communications of Abe Chapman, and in order to obstruct, impede, and prevent such interception, gave notice and attempted to give notice of the possible interception to Abe Chapman. In violation of Title 18, United States Code, Section 2232(c).

Section 2232(c) provides in part:

Notice of Certain Electronic Surveillance. — Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent *such interception*, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2232(c) (emphasis added).

This language requires a pending application for authorization or an authorization that has not expired. The Government argues that, under section 2232(c), it is sufficient if, at some time in the past, there was a wiretap application; it does not matter, under the Government's theory, if the wiretap application has already been denied or if authorization has been granted but has already expired. This is not a reasonable construction of the statute.

The plain language of the statute makes it clear that the purpose of the statute is to prevent interference with "possible interception." It is possible that disclosure of an existing wiretap can lead to interference with interception. It also is possible that disclosure of a pending wiretap application, if the application is subsequently authorized, can lead to interference with interception. However, disclosure of an application that already has been denied, or whose authorization already has expired, cannot possibly interfere with "such interception." The language, "such interception," shows that the statute pertains to the particular application or authorization of which the defendant has knowledge. The defendant must intend to impede an interception from the specific application or authorization of which he has knowledge.

Section 2232(c), read with the language essential to this charge, is as follows:

Whoever having knowledge that a Federal . . . officer . . . has applied for . . . authorization . . . to intercept a wire . . . communication in order to obstruct . . . *such interception* gives notice or attempts to give notice of the possible interception to any person shall be fined . . . or imprisoned. . . .

(emphasis added.)

The statutory language is directed to disclosure of a wiretap that could possibly result from the application of which the defendant has knowledge—not from some later application, which would require a completely new justification under 18 U.S.C. § 2518(5). At the very least, this is a reasonable construction of the statute. We conclude that the Government's construction is an unwarranted expansion of the statutory language, and one which ignores the crucial phrase "such interception." However, even if the Government's interpretation were possible because of some ambiguity, the more lenient construction is required.

To reject a reasonable construction of a statute is incompatible with the rule of lenity. "In interpreting the substantive ambit of criminal prohibitions, ambiguities must be resolved in favor of the criminal defendant." *United States v. Baxley*, 982 F.2d 1265, 1270 (9th Cir.1992); see *United States v. Batchelder*, 442 U.S. 114, 121, 99 S.Ct. 2198, 2202, 60 L.Ed.2d 755 (1979); *Simpson v. United States*, 435 U.S. 6, 14, 98 S.Ct. 909, 914, 55 L.Ed.2d 70 (1978). The plain language of the statute is clear, but even if it were possible to arrive at the Government's construction out of some ambiguity in the statute, it would violate the rule of lenity to do so.

Furthermore, there is no indication that the statute's primary concern is with the giving of notice with specific intent to interfere with surveillance in general, as the Government contends. The statute does not impose liability on a defendant who interferes with "any future surveillance" or "any future wiretap." Rather, it imposes liability on a defendant who has knowledge of a particular wiretap application or authorization and who gives another person notice of "the possible interception" in an effort to obstruct "such interception." See 18 U.S.C. § 2232(c). The Government's interpretation that the statute applies to interference with future surveillance does not accord with the plain language of the statute.

The Government relies on an isolated phrase in a Senate Committee Report to construe the statute as applying to applications for wiretaps that have expired. In interpreting a federal statute, we seek to determine the intent of Congress. The primary indication of that intent is the language of the statute. It is only if the language is unclear that we refer to legislative history as an aid to the statutory interpretation. *Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984); *United States v. Koyomejian*, 970 F.2d 536, 543 (9th Cir.) (Kozinski, J.,

concurring), *cert. denied*, ____ U.S. ____, 113 S.Ct. 617, 121 L.Ed.2d 550 (1992); *Haynes v. United States*, 891 F.2d 235, 238 (9th Cir.1989). In this case, we conclude that the language of the statute clearly expresses the congressional intent. Furthermore, the language of the statute is consistent with the purpose of the Electronic Communications Act, as expressed in the Senate Report, which is "to protect against the unauthorized interception of electronic communications," so as to further "guard against the arbitrary use of Government power to maintain surveillance over citizens. . . ." S.Rep. No. 541, 99th Cong., 1st Sess. 1, (1986), reprinted in 1986 U.S.C.C.A.N. 3555. (Volume 5.)

First Amendment considerations also militate against the Government's construction of section 2232(c). Statutes must be construed, if fairly possible, to avoid constitutional problems. See *Communications Workers of America v. Beck*, 487 U.S. 735, 762, 108 S.Ct. 2641, 2657, 101 L.Ed.2d 634 (1988); *United States ex rel. Madden v. General Dynamics*, 4 F.3d 827, 830 (9th Cir. 1993). According to the Government, section 2232(c) bars the disclosure of wiretap applications for an indefinite period of time. However, it is unlikely that the Government would be able to assert the necessary compelling interest³ in barring disclosure of a wiretap application many months or years after the fact, since the possibility that such disclosure would lead to the obstruction of an existing wiretap is extremely slim. Moreover, the impact on First Amendment interests could be substantial. The suppression for an indefinite period of information regarding politically-motivated wiretaps, such as those that occurred at the height of the civil rights movement, could not only

³ See *Sable Communication of California, Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989).

impede free speech but could obstruct efforts to correct past government misconduct and to avert similar abuses of power in the future. Our concern that section 2232(c), as construed by the Government, might reach a "substantial amount of constitutionally protected conduct" thus reinforces our more limited interpretation of the statute. See *United States v. Hutson*, 843 F.2d 1232, 1234 (9th Cir.1988) (setting out test for First Amendment overbreadth challenge) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S.Ct. 1186, 1991, 71 L.Ed.2d 362 (1982)).

The Government argues that the existence of a wiretap or pending application is unnecessary because the statute criminalizes attempts. Thus, the Government maintains, an attempt to obstruct the interception of a wire communication is sufficient for a conviction, as long as the defendant knows of a wiretap application or authorization and discloses it, whether or not such an application or authorization in fact still exists at the time of disclosure.

Section 2232(c) is not a classic attempt statute. The classic attempt statute criminalizes an attempt to violate *another* statute or *another* statutory subsection. See, e.g., 18 U.S.C. § 1113 (1988) (criminalizing an attempt to commit murder or manslaughter; murder criminalized by 18 U.S.C. § 1111 (1988) and manslaughter criminalized by 18 U.S.C. § 1112 (1988)); 18 U.S.C. § 1201(d) (1988) (criminalizing an attempt to violate 18 U.S.C. § 1201(a)(4) (1988), which prohibits the kidnapping of foreign officials). There is not a statute that criminalizes attempts to violate section 2232(c), and section 2232(c) does not criminalize an attempt to violate another statute or statutory subsection.

Section 2232(c) itself punishes someone who "gives notice *or attempts* to give notice" of possible interception (emphasis added). A reading of the statute demonstrates

that the word "attempt" modifies only the words "to give notice." There is no modification of the requirement of a possible interception. In order for a statutory violation to occur under section 2232(c), the element of "possible interception" must be met. Thus, the wiretap must be in existence or there must be a pending application or authorization. As we have discussed, actually giving notice of an expired wiretap authorization or application is not a violation of section 2232(c); *a fortiori* an attempt to give notice of an expired authorization or application cannot be a violation of the statute. Thus, the attempt aspect of the statute is not involved in this case. The issue in this case is not whether Judge Aguilar attempted to disclose prohibited wiretap information, but whether the wiretap information he did disclose was prohibited.

The Government relies on *United States v. Russell*, 255 U.S. 138, 41 S.Ct. 260, 65 L.Ed. 553 (1921), and *United States v. Zemek*, 634 F.2d 1159 (9th Cir.1980), *cert. denied*, 450 U.S. 916, 101 S.Ct. 1359, 67 L.Ed.2d 341 (1981), to support its argument that § 2232(c) bars the attempted disclosure of an expired wiretap. The statute at issue in *Russell* criminalized improperly influencing or endeavoring to influence "any . . . juror." 255 U.S. at 140, 41 S.Ct. at 260. Although the indictment did not state that the person whom the defendant approached had actually been selected to be a juror, the court ruled the omission immaterial. *Id.* at 143, 41 S.Ct. at 261. It held that a person who has been summoned for jury service at the defendant's trial but has not yet been selected or sworn is a "juror" for purposes of the statutory provision involved. In *Zemek*, where the statute covered obstructing or endeavoring to obstruct the communication of information to a criminal investigator, we found it irrelevant that the criminal investigation had already terminated. 634 F.2d at 1176-77. We held that the statute did not provide

that an investigation must be in progress, only that the defendant must have obstructed or attempted to obstruct communications to an investigator. We then found that the proof necessary to satisfy the statutory requirement that the intended recipient of the communication be an "investigator" was unchallenged. *Id.* at 1177 n. 22. *Russell* and *Zemek* are distinguishable from this case.

The critical difference between *Russell* and *Zemek*, on the one hand, and the case before us, on the other, is evident. In both of the earlier cases, the obstruction related to an entity that *actually existed* at the time of defendant's criminal action—in *Russell*, the court found that there was a "juror" *in esse*, in *Zemek*, the court held that there was an actual "investigator." Here, the Government urges an entirely opposite theory: that the statute is violated by the attempted disclosure of an entity that *does not exist*, i.e., a wiretap that has *expired*.

The dissent argues that it is irrelevant whether interception was objectively possible or not, in short, that factual impossibility is not a defense. The present case, however, involves not just factual impossibility, but legal impossibility. It is the latter which is dispositive here. The doctrine of legal impossibility has been a part of criminal law for centuries. *See R. v. Carr*, 168 Eng. Rep. 854 (1819) (defendant acquitted on grounds of legal impossibility). Where legal impossibility exists, there can be no violation of a statute. An example of legal impossibility may be seen if we change one basic fact in *Russell*. Specifically, in *Russell*, had there been no trial contemplated at all, and thus no possible jurors to attempt to influence, it would have been legally impossible for the defendant to have committed a statutory violation. Similarly, no matter what "concrete action" a defendant may take, if no wiretap exists or is currently authorized and if there is no pending application, there is no way that the defendant can obstruct

or attempt to obstruct the possible interception of a wiretap. In short, in the case before us, because the wiretap had expired at the time Judge Aguilar acted, no violation of section 2232(c) occurred.

The fact that other wiretaps were subsequently authorized on the telephones of a number of individuals, including the individual whose phone had been tapped under the April 20 authorization, cannot save the Government's case. The statute prohibits disclosure of a wiretap of which a defendant has knowledge.⁴ The only application about which Judge Aguilar had any knowledge was the application mentioned by Judge Peckham. This application had resulted in the authorization to tap Rudy Tham's telephone and had expired by the time Judge Peckham spoke to Judge Aguilar. Therefore, there was no possibility that Judge Aguilar by any notification could have impeded an interception authorized as a result of that application.

For the above reasons, we conclude that the record in this case fails to establish that Judge Aguilar violated 18 U.S.C. § 2232(c).

IV.

OBSTRUCTION OF JUSTICE CHARGE

Judge Aguilar was convicted on Count Eight of the indictment, which stated:

1. At all times relevant to this count of the indictment, defendant AGUILAR was aware that a federal grand jury in the Northern District of California was investigating possible violations of federal criminal law by ROBERT P. AGUILAR, Abe Chapman, Michael Rudy Tham, and others.

⁴ Under the statute, knowledge of an application for or authorization of the wiretap satisfies the scienter requirement.

2. On or about June 22, 1988, defendant ROBERT P. AGUILAR, while a United States District Judge, did corruptly endeavor to influence, obstruct, and impede the aforementioned grand jury investigation, and thus the due administration of justice in the Northern District of California, by making false and misleading statements to Special Agents of the Federal Bureau of Investigation concerning defendant AGUILAR's assistance to Michael Rudy Tham and concerning defendant AGUILAR's knowledge and disclosure of information concerning court-ordered electronic surveillance of Abe Chapman.

In violation of Title 18, United States Code, Section 1503.

A. *Facts*

The facts that led to the obstruction of justice charge are as follows.

In the course of the FBI investigation of the possible attempt to influence Judge Weigel in ruling on Tham's petition, the FBI agents decided to interview Judge Aguilar to determine the extent of his involvement in the matter.

They asked Judge Aguilar questions about his involvement with Chapman and Solomon concerning Tham's petition, and about his knowledge of a wiretap and what he told Chapman. The jury found that some of his responses were false and misleading.

B. *The Scope of 18 U.S.C. § 1503*

We reverse the conviction of endeavoring to obstruct justice because the conduct charged in the indictment and found by the jury does not constitute a violation of section 1503. The jury found that Judge Aguilar, as a target of the investigation, made false and misleading statements to the FBI agents, minimizing his involvement with Chapman

and attorney Solomon. Conduct of this nature is governed not by section 1503 but by 18 U.S.C. § 1001 (1988), which concerns false statements to federal agencies. Judge Aguilar was not charged with a violation of section 1001. Furthermore, even under a section 1001 charge, the statute does not apply to certain situations where a truthful response would have incriminated the declarant. This is known as the "exculpatory no" doctrine. We explained the application of section 1001 and the "exculpatory no" doctrine in *United States v. Equihua-Juarez*, 851 F.2d 1222, 1224 (9th Cir.1988).

In the case before us, Judge Aguilar is charged with obstructing justice under section 1503, which provides:

3. *Influencing or injuring officer or juror generally*

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, *or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice*, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1503 (emphasis added). The underscored part of this statute is often referred to as the "omnibus clause," and it is the part of the statute that Judge Aguilar is alleged to have violated.

This statute requires the obstruction of a judicial proceeding, not simply an FBI investigation. The judicial proceeding he is charged with obstructing is a grand jury investigation of a conspiracy involving himself and others. There is no evidence that Judge Aguilar coerced, intimidated or attempted to persuade the FBI agents to testify falsely before the grand jury. Instead, at trial the jury found that he misled the FBI about the extent of his contacts with Chapman and Solomon. This does not constitute the crime of obstructing justice under section 1503.

We have interpreted section 1503 as extending only to interference with a pending judicial proceeding. *United States v. Brown*, 688 F.2d 596, 598 (9th Cir.1982). Interference with a government agency's investigation is insufficient. *Id.* There is no evidence that a grand jury had authorized or directed the FBI investigation; nor is there evidence that the FBI agents had been subpoenaed to testify. The conduct alleged was interference with an FBI investigation, not a judicial proceeding. The fact that the FBI investigation could result in producing evidence that might be presented to a grand jury is insufficient to constitute a violation of section 1503.

To construe the statute as the Government has in this case would mean that anyone who makes a false statement to any person who might be or is expected to be a witness before a grand jury or any other judicial proceeding about a subject under investigation could be guilty of the crime of obstructing justice. Other statutory sections safeguard against misinformation to a grand jury. False testimony before a grand jury is punishable as perjury. Causing a witness knowingly to testify falsely is suborning perjury. This obstruction of justice statute was not intended to extend to the facts of this case.

In analyzing Congress's intended application of section 1503, a brief history of the section is enlightening. Section 1503, as it was originally enacted in 1948, specifically proscribed certain conduct seeking to influence witnesses, as well as judicial officers and jurors, in judicial proceedings. The title of the section, as well as the body, indicated that the statute was intended to cover judicial officers, jurors, and witnesses. The full text of the statute is set forth in the margin.⁵ In 1982, Congress enacted the Victim and Witness Protection Act, 96 Stat. 1248 (1982). This new statute removed all references to witnesses in section 1503 and enacted a new section 1512, addressed specifically to the influencing of witnesses, victims, and informants. The

⁵ § 1503. INFLUENCING OR INJURING OFFICER, JUROR OR WITNESS GENERALLY

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

62 Stat. 769 (1948).

Second Circuit in *United States v. Hernandez*, 730 F.2d 895, 899 (2d Cir. 1984), stated in its conclusion that section 1512 replaced that part of section 1503 that pertained to witnesses. The *Hernandez* case involved a threat to kill a witness, and the court held that the charge could not be sustained under section 1503. *Id.*

Our court faced a charge of witness tampering under somewhat different circumstances in *United States v. Lester*, 749 F.2d 1288 (9th Cir. 1984). The facts in the *Lester* case involved the hiding and bribing of a witness in order to prevent him from testifying in a criminal trial. We disagreed with the broad statement of the Second Circuit in the *Hernandez* case that "[C]ongress affirmatively intended to remove witnesses entirely from the scope of § 1503." *Id.* at 1295 (internal quotation omitted). We distinguished *Hernandez*, noting that it dealt with intimidation and harassment of a witness, whereas *Lester* involved non-coercive witness tampering. We observed that section 1512 did not encompass such non-coercive conduct and, thus, concluded that this conduct still remained punishable under the omnibus clause of section 1503. *Id.* at 1295-96.

In 1986, the Second Circuit dispelled any doubts about what was meant by the *Hernandez* opinion, stating that section 1512 was intended to completely supplant the portion of section 1503 that dealt with witnesses. *United States v. Jackson*, 805 F.2d 457, 461 (2d Cir. 1986), cert. denied, 480 U.S. 922, 107 S.Ct. 1384, 94 L.Ed.2d 698 (1987). This presented a clear conflict with our *Lester* case.

In 1988, Congress obviated this conflict between the Ninth and Second Circuits by amending section 1512 to cover specifically non-coercive witness tampering. This eliminated the problem that we discussed in *Lester*.⁶

⁶ The Second Circuit in *United States v. Masterpol*, 940 F.2d 760, 763 (2d Cir. 1991), observed that the 1988 amendments "diminished

Section 1512, as it read at the time of our decision in *Lester*, was limited to witness tampering by a person who accomplished it or attempted to accomplish it through intimidation, physical force, threats or misleading conduct. This left non-coercive witness tampering untouched unless it could be classified as "misleading conduct." The 1988 amendment to section 1512 inserted the phrase "or corruptly persuades" within the proscribed conduct, thus providing for non-coercive witness tampering. The pertinent part of section 1512 as amended is as follows:

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

....

shall be fined not more than \$250,000 or imprisoned not more than ten years, or both.

This amendment was adopted November 18, 1988, approximately five months after the conduct forming the basis for the charge against Judge Aguilar occurred. Thus, in our circuit, under the authority of the *Lester* opinion, non-coercive witness tampering was still covered under the omnibus clause of section 1503.⁷

The importance of the legislative history to this case is that in removing the conflict between the Ninth Circuit and the Second Circuit, Congress indicated what type of

significantly" the force of the *Lester* precedent. Perhaps, more fundamentally, it could be stated that the problem we saw in *Lester* was alleviated by Congress.

⁷ In view of the result we reach, it is unnecessary to revisit the question of whether *Lester* was correctly decided.

non-coercive conduct was meant to be proscribed with regard to witnesses. It is conduct that "*corruptly persuades . . . or attempts to do so*" in order to influence or prevent the testimony of any person in an official proceeding.

In order to sustain a conviction under the omnibus clause of section 1503, it must found that Judge Aguilar's actions "corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." Congress's translation of this requirement as it pertains to witnesses, by its amendment to section 1512, indicates that the conduct must involve a defendant who "corruptly persuades . . . or attempts to [persuade]" a witness so as to influence his testimony.

If a person sought to influence the testimony of a witness by bribery or extortion, this would clearly fall within the normally accepted meaning of corrupt. Simply making a false statement to a potential witness is a far cry from any generally accepted meaning of "corrupt influence" or "corrupt persuasion."⁸ To place in contrast the type of

⁸ We find *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 656, 121 L.Ed.2d 583 (1992), most helpful on this point. In that case the D.C. Circuit held that the term "corruptly," as used in 18 U.S.C. § 1505, was unconstitutionally vague as applied to Poindexter's false statements to Congress. The court's interpretation of section 1505 was based on section 1503, since the language of section 1505, including its "omnibus clause," was borrowed from section 1503.

The *Poindexter* court found that while the defendant's false statements violated section 1001, they were not obviously encompassed within section 1505's prohibition against corruptly influencing, obstructing or impeding a congressional inquiry. The court found that the term corruptly—although "at least as used in § 1503, . . . is something more specific than simply 'any immoral method used to influence a proceeding,'"—did not give constitutionally sufficient

conduct that would be corrupt influence, consider the following hypothetical fact situation: FBI agents go to a judge, state that they have done an investigation, and reveal certain facts that they intend to relate to a grand jury, which indicate that the judge had engaged in a conspiracy to influence another judge. If the defendant judge appeals to them not to so testify because it would harm his career, offers them a bribe not to testify, or threatens that he will see that they lose their jobs if they testify—that would amount to an attempt to corruptly influence the FBI agents to change their testimony.

There is no evidence that Judge Aguilar tried to tell the FBI how to testify, tried to persuade them not to testify, or tried to dissuade them from testifying as to what their investigation otherwise revealed. The only evidence is that he made false and misleading statements to the FBI regarding his contacts with Chapman and Solomon. This is very different from the other types of activities enumerated in section 1503.⁹

There is a significant difference between making a false statement to a potential witness and trying to persuade a witness to change his or her testimony through threats, force, bribery, extortion or other means of corrupt per-

notice that it prohibited false statements to Congress. *Poindexter*, 951 F.2d at 382, 386. Our construction of section 1503 renders this constitutional inquiry unnecessary, but we note that the constitutional issue raised and decided adversely to the Government in *Poindexter* is nearly identical to the issue that is present here and that we would be required to conduct the same analysis as the D.C. Circuit were we to construe the statute in the manner urged by the prosecution.

⁹ See *United States v. Ryan*, 455 F.2d 728, 733 (9th Cir. 1972) (stating that under the "omnibus clause" of section 1503, "[t]he offense charged must be similar to those specified in the statute, applying the doctrine of *ejusdem generis*") (citing *United States v. Essex*, 407 F.2d 214 (6th Cir. 1969)).

suation. Under our past case law, *only* section 1001 has ever covered simple false statements. Prior to its 1988 amendment, section 1503 extended to persuading a witness to tell a false story (*see United States v. Gates*, 616 F.2d 1103, 1105, 1107 (9th Cir. 1980)); the amendment explicitly shifted the prohibition on such "corrupt persuasion" of a witness to section 1512. At no point, however, has this court interpreted either section 1503 or section 1512 as barring the making of a false and misleading statement to a potential grand jury witness. Instead, Congress's use of the phrase "or corruptly persuades" is consistent with our past case law, corroborating our reliance on that later statutory language as a guide to interpreting the pre-amendment section 1503.

Construing section 1503 so broadly as to cover making false and misleading statements to FBI agents would implicate the Fifth Amendment concerns underlying the exculpatory no doctrine of section 1001. *Cf. United States v. Alzate-Restreppo*, 890 F.2d 1061, 1068 (9th Cir. 1989) (Patel, J., concurring, joined by D.W. Nelson, J.); *United States v. Lambert*, 501 F.2d 943, 946 n.4 (5th Cir. 1974) (exculpatory no doctrine stems from judges' "latent distaste for an application of the statute that is uncomfortably close to the Fifth Amendment"). Thus, interpreting section 1503 as overlapping with section 1001 would at the very least require us to engraft the exculpatory no doctrine onto section 1503.

If "corruptly influence" is extended to mean "making false statements to a potential witness," we will have expanded the statute far beyond its reasonable construction. If for no other reason, the rule of lenity would preclude such a construction. As we discussed in connection with the wiretap charge, in interpreting a criminal statute, where there is possible ambiguity, the more lenient con-

struction is required. *United States v. Baxley*, 982 F.2d 1265, 1270 (9th Cir. 1992).

For the above reasons we conclude that the record in this case fails to establish that Judge Aguilar violated 18 U.S.C. § 1503.

V.

CONCLUSION

We reverse the convictions on both Counts VI and VIII because neither section 2232(c) nor section 1503 extends to the facts of this case. Consequently, we do not reach Judge Aguilar's contention that an erroneous knowledge instruction compels reversal nor the Government's cross-appeal contending that the district judge erred in sentencing.

REVERSED.

FERNANDEZ, Circuit Judge, in which WALLACE, Chief Judge, joins, concurring and dissenting:

I concur in the majority's opinion regarding Count Eight. However, I must respectfully dissent as to Count Six. In my opinion, 18 U.S.C. § 2232(c) does cover Judge Aguilar's actions. As I see it, the government was required to prove that Judge Aguilar knew that a wiretap had been applied for; that Judge Aguilar intended to obstruct or impede the interception for which the application was designed to obtain authorization; and that Judge Aguilar gave or attempted to give notice of the possible interception.

For purposes of this opinion, I (along with the majority) will take it as a given that Judge Aguilar knew of the wiretap application.¹ I also take it that he even knew that a

¹ His conversation with Judge Peckham indicates that.

wiretap might well result from that application.² I further take it that he did not know about the later applications and wiretaps, including the one which was in place when he made his disclosures to Chapman, although the latter assumption is somewhat problematic. He certainly talked and behaved as if he thought a wiretap *was* in place.

It cannot be doubted that Judge Aguilar conveyed information to Chapman with the intent to impede interception. We need not be concerned with whether he thought that the initial wiretap authorizations were extended or thought something else. We need only take him at his word. He did think that the information disclosed to him meant that Chapman's conversations were being intercepted by a wiretap.

That leaves only the question of whether Judge Aguilar would have attempted "to give notice of the possible interception." 18 U.S.C. § 2232(c) (West Supp. 1993). The majority reads this to mean that an interception must have been objectively possible at the time the notice was given or at the time that the attempt to give notice was made. I believe that is a strange way to read the statute. To my mind, the statute must be read to mean that a defendant has fulfilled this element upon attempting to warn someone that an interception of that person's telephone communications is possible. Here the defendant, Judge Aguilar, was correct. Interception *was* then possible. But that is not the point. The point is that Judge Aguilar's own wrongdoing was his attempt to give a notice that would interfere with a wiretap. Here his attempt to interfere could have gone awry for any of a number of reasons. His nephew might not have conveyed his message. The telephone lines could have come down while he was calling a

² Indeed, in his conversation with Solomon he said, "Oh yeah the phone's definitely tapped. . . . Absolutely."

target. The wiretap might not have been in place; indeed, there never was a wiretap on Chapman's own telephone. Chapman may no longer have been targeted. The authorization itself might not have been granted pending further information. The wiretap might have expired. Etc.

Of course, Judge Aguilar's concrete action was the notice he gave or attempted to give. That is the only thing that went beyond mental states — knowledge, intent, belief that interception was possible, and belief that interception could be obstructed. When a defendant tries to give notice, we can be sure that we are not punishing thoughts alone. Rather, his wrongdoing becomes manifest, just as it did here. Judge Aguilar matched his actions to his thoughts. He attempted to give notice of the possible interception of Chapman's conversations.

It seems to me that the statute is clear enough on this point to make resort to legislative history unnecessary. See *United States v. Galliano*, 977 F.2d 1350, 1352 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1399, 122 L.Ed.2d 772 (1993). But if we do so resort, any doubt is removed by two salient comments in the brief Senate Report. See S.Rep. No. 541, 99th Cong., 1st Sess. 1, 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3588.³ That report indicates an intent to punish conduct which gives notice of the possible interception to someone who *was* a target. *Id.* Use of the past tense shows that the person may no longer be a target, so that no interception would remain possible in the objective sense. More importantly, the report states that "[t]he offense also includes an attempt to engage in the offense." *Id.* At the very least, Judge Aguilar made that attempt. He did his very best to obstruct any possible interception of Chapman's telephone conversations.

³ The House Report is to the same effect. See H.R. Rep. No. 99-647, 99th Cong., 2d Sess., at 61 (1986).

I am not unaware of the rule of lenity, but it should only be applied when there is some "grievous ambiguity or uncertainty" which cannot be overcome. *Chapman v. United States*, 500 U.S. 453, ___, 111 S.Ct. 1919, 1926, 114 L.Ed.2d 524 (1991). There is no such ambiguity here. Perhaps in saying that I show too much temerity in the face of the majority opinion. However, I cannot find opacity where a straight-forward reading of the statute gives fair warning to the citizen of what is required to violate its terms. I believe that to be the case here. I do not think one has to try to convert dross into precious metal in order to reach this conclusion; rather, I think that by some exercise of thaumaturgy gone awry, the majority has turned gold into lead. Judge Aguilar "knew" of the application, intended to impede the interception which would flow from that application, and told Chapman that it was possible that his conversations would be intercepted. That is all the government had to prove.

I refrain from discussing the other issues that would have to be wrestled with before actually affirming Judge Aguilar's conviction, such as the meaning of knowledge. Given the majority opinion, that discussion would encumber the reports without deciding anything.

In sum, I agree with the majority that Judge Aguilar's conduct cannot lead to a conviction under 18 U.S.C. § 1503, but I believe that it could, and properly did, lead to a conviction under 18 U.S.C. § 2232(c).

APPENDIX B

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

 Nos. 90-10597, 91-10024

 UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

 ROBERT P. AGUILAR,
DEFENDANT-APPELLANT

 UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE-CROSS-APPELLANT

v.

 ROBERT P. AGUILAR,
DEFENDANT-APPELLANT-CROSS-APPELLEE

 Appeal from the United States District Court
for the Northern District of California

 Argued and Submitted Dec. 12, 1991
Decided May 12, 1993
As Amended Aug. 9, 1993
Rehearing En Banc Ordered Sept. 2, 1993

 Before: HUG, HALL and O'SCANNLAIN, Circuit Judges.

ORDER

On June 13, 1989, a federal grand jury returned an eight count indictment against United States District Judge Robert P. Aguilar. The indictment charged Judge Aguilar with conspiring to defraud the United States in violation of 18 U.S.C. § 371, disclosing the existence of a wiretap application in violation of 18 U.S.C. § 2232(c) (counts four and six), endeavoring to obstruct justice in violation of 18 U.S.C. § 1503 (counts seven and eight), and racketeering in violation of 18 U.S.C. § 1962(c). In August 1990, Judge Aguilar went to trial on five of the counts and, on August 22, a petit jury found him guilty on one count of illegally disclosing a wiretap in violation of 18 U.S.C. § 2232(c) (count six) and one count of endeavoring to obstruct a grand jury investigation in violation of 18 U.S.C. § 1503 (count eight). It acquitted Judge Aguilar on the other three counts. On November 1, 1990, the district court sentenced Judge Aguilar to two six month terms of imprisonment, to be served concurrently, and fined him \$2,000. Aguilar appeals his conviction on both counts and the government appeals his sentence.

The separate opinions of Judges Hug and O'Scannlain are filed contemporaneously with this order and opinion. The conviction for wiretap disclosure, count six of the indictment, is **AFFIRMED** for the reasons expressed in this opinion, as to which Judge O'Scannlain concurs in part. The conviction for obstruction of justice, count eight of the indictment, is **REVERSED** for the reasons expressed in the dissenting opinion of Judge Hug, as to which Judge O'Scannlain concurs in part. The sentence of six months' imprisonment and fine of \$1,000 under count six is **VACATED** for the reasons expressed in the opinion of Judge O'Scannlain, as to which Judge Hug concurs in part, and **REMANDED** for reconsideration in light of

United States v. Lira-Barraza, 941 F.2d 745 (9th Cir.1991) (en banc).

OPINION

CYNTHIA HOLCOMB HALL, Circuit Judge:

I

BACKGROUND ¹

The chain of events leading to Judge Aguilar's indictment began with the 1980 conviction of Michael Rudy Tham for embezzling \$2,000 from Local 856 of the Freight Checkers, Clerical Employees and Helpers Union, an affiliate of the International Brotherhood of Teamsters. Tham was Secretary-Treasurer of Local 856 and a member of several local and national Teamster committees. In July 1987, Tham filed a motion under 28 U.S.C. § 2255 to have the conviction set aside. In an effort to gain favorable treatment from District Judge Stanley Weigel, Tham sought the assistance of attorney Edward Solomon, an acquaintance of Judge Aguilar, and Abraham Chalu-

¹ Judge Hug's proposition that we view the facts from Judge Aguilar's perspective because the jury acquitted him on the conspiracy charge is novel, to say the least. See *post* at 627-28 (Hug, J., dissenting). The acquittal did not prove Aguilar's innocence; at most it proves a reasonable doubt as to his guilt. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361-62, 104 S.Ct. 1099, 1104, 79 L.Ed.2d 361 (1984). We have no way of knowing whether the jury acquitted Aguilar on the evidence or by way of mistake, compromise or lenity. See *United States v. Powell*, 469 U.S. 57, 65, 105 S.Ct. 471, 476, 83 L.Ed.2d 461 (1984). We do know that the jury did not credit all of Judge Aguilar's testimony, given the two convictions. We view the evidence and the inferences to be drawn therefrom in the light most favorable to the verdicts. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *United States v. Bishop*, 959 F.2d 820, 829 (9th Cir. 1992).

powitz, alias "Trigger Abe" Chapman, a putative mobster distantly related to Judge Aguilar by marriage. Chapman arranged a September 12, 1987, meeting between Solomon and Judge Aguilar to discuss Tham's case and how Judge Aguilar could assist Tham's petition. Over the next several months, Judge Aguilar discussed the case regularly with Chapman and Solomon, reporting to them his conversations with Judge Weigel about the matter.

Throughout this time, the San Francisco FBI was investigating local labor racketeering as part of a nationwide probe into health care provider fraud. Tham and Chapman were among the subjects of the investigation. On April 20, 1987, the FBI applied to then-Chief United States District Judge Robert Peckham for authorization to conduct electronic surveillance of Tham's business telephones and named Chapman as an interceptee of the wiretap. On May 20, the wiretap expired and, on July 15, Judge Peckham signed the first of a series of orders maintaining the secrecy of the wiretap while the investigation was ongoing. The last of the orders was signed on January 25, 1989.

As the investigation progressed, the FBI discovered that Chapman had a relationship with Judge Aguilar. On July 9, state agents observed Chapman leaving the Federal Building in San Jose with Judge Aguilar. The state agents informed the FBI and the FBI informed Judge Peckham. Judge Peckham expressed his concern, as well as his belief that Judge Aguilar must have been ignorant of Chapman's criminal activities.

A month later at an ABA reception in the Mark Hopkins Hotel in San Francisco, in an effort to warn Judge Aguilar about the character of the company he was keeping and help him avoid the appearance of impropriety, Judge Peckham mentioned to Judge Aguilar that

Chapman's name had come up in connection with a wiretap application. He remarked that years earlier, as an Assistant United States Attorney, he had prosecuted Chapman on a drug charge and expressed his surprise that Chapman was still involved in criminal activity. Judge Aguilar indicated that he knew Chapman, but disclosed nothing else about their relationship.

Several months later, on February 6, 1988, Chapman paid a visit to Judge Aguilar at his home. As Chapman was leaving, Aguilar noticed that they were being observed from across the street by a man whom Judge Aguilar suspected was an FBI agent. Immediately Judge Aguilar telephoned his nephew Steve Aguilar, Chapman's grandson, and asked him to come to Aguilar's house. When Steve arrived, Judge Aguilar told him that an FBI agent was following Chapman and that he had heard "at work" that Chapman was being wiretapped. He instructed Steve to relay the information to Chapman, which he apparently did.

On April 26, 1988, a grand jury in the Northern District of California began to hear evidence regarding a conspiracy by Judge Aguilar, Tham, Chapman and Edward Solomon to influence the outcome of Tham's case. In May, Solomon agreed to cooperate with the FBI. On May 17, Solomon wore a wire to a luncheon meeting with Judge Aguilar. Over the course of their conversation, Judge Aguilar revealed that he had discussed the Tham matter with Judge Weigel and had warned Chapman about the wiretap. He also instructed Solomon to lie to the FBI about Aguilar's involvement in Tham's case. On May 26, Solomon recorded a second conversation in which he informed Aguilar that a grand jury was investigating their dealings in the Tham case. The two men also discussed how Solomon should lie to the grand jury in order to

explain the records of Solomon's telephone calls to Judge Aguilar regarding the Tham matter.

Armed with this evidence, two FBI agents met with Judge Aguilar on June 22, 1988, and questioned him about his involvement in the Tham case. Before Judge Aguilar would respond to any questions, he wanted to know if he was a "target" of a grand jury investigation. Agent Carlon hesitated in answering the question, but when Aguilar said, "I assume from this that I very likely am [a target] if I've done anything wrong," Carlon responded affirmatively. Judge Aguilar then proceeded to lie to the agents about his relationship with Solomon, his involvement in the Tham case, and his knowledge of the wiretap. In response to Aguilar's further questions about whether or not he was a target, Carlon conceded that a grand jury was meeting, but would say nothing about the subject of the investigation or Aguilar's status. The interview continued and Aguilar lied further about his dealings with Chapman. At trial, Judge Aguilar testified that, by the end of the interview, he had concluded that his statements would be presented to the grand jury.

Based on this evidence, the jury convicted Judge Aguilar on one count of disclosing the existence of a wiretap in violation of 18 U.S.C. § 2232(c) and one count of endeavoring to obstruct a grand jury investigation in violation of 18 U.S.C. § 1503. Aguilar appeals each conviction on several grounds. He argues that the government's evidence was insufficient to prove that he satisfied the "knowledge" requirement of either section 2232(c) or section 1503; that the jury instructions misstated the "knowledge" elements of the statutes; and that the instructions impermissibly shifted to him the burden of proving that he lacked the knowledge required by these statutes. He also argues that the application of section 2232(c)

to his disclosure of the wiretap violates his First Amendment right to free speech.

The government appeals Judge Aguilar's sentence, arguing that the district judge had no authority to depart downward six levels from the sentence level prescribed in the Sentencing Guidelines.

II

DISCLOSURE OF THE WIRETAP

The wiretap disclosure statute, 18 U.S.C. § 2232(c),² makes it a crime for any person *with knowledge* that a wiretap authorization has been applied for or granted to divulge that knowledge with the purpose of impeding the interception of communications. Accordingly, the trial court instructed the jury that the government was required to prove that "defendant had knowledge that authorizations to conduct electronic surveillance of Abe Chapman had been applied for." The court continued:

Knowledge of a fact, members of the jury, means that you're satisfied from the evidence that he knew it[.] Or knowledge of the existence of a particular circumstance may be satisfied by proof that the defendant *was aware of a high probability of the existence of that circumstance[.] unless you find from the evidence that the defendant actually believed that the circumstance did not exist.*

² Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 to intercept a wire, oral, or electronic communication, in order to obstruct, impede or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2232(c) (1988).

(emphasis added). Aguilar raises four challenges to his conviction under section 2232(c). He argues that: (1) the evidence was insufficient to demonstrate that he had "knowledge" that the FBI had applied to conduct a wiretap; (2) application of section 2232(c) to Aguilar's disclosure of the wiretap violated his First Amendment right to free speech; (3) the trial court's jury instruction on the "knowledge" requirement of section 2232(c) misstated the element; and (4) the "knowledge" instruction unconstitutionally shifted the burden of proof on "knowledge" onto Aguilar.

A. Sufficiency of the Evidence

Aguilar argues that the evidence was insufficient to show that he had knowledge of a wiretap application. In reviewing the sufficiency of the evidence, this Court must determine whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

A defendant may not be convicted under section 2232(c) for disclosing a wiretap unless there is sufficient evidence to show that he knew that permission to conduct a wiretap had been applied for or granted. The evidence in this case was sufficient to convince a rational trier of fact that Judge Aguilar had such knowledge. The jury heard the tape of the May 17 conversation between Judge Aguilar and Edward Solomon, in which Judge Aguilar stated that he "knew they were wiretapping [Chapman]," and described learning about the wiretap from Judge Peckham. A criminal defendant's own statements about his knowledge are as strong evidence of that knowledge as a jury is ever likely to hear. This evidence was reinforced by

Judge Peckham's testimony that he told Judge Aguilar about the wiretap application and Steven Aguilar's testimony that his uncle told him that he had learned at work that Chapman's telephone had been tapped.³

Aguilar argues that "the fact that both the application and the wiretap had long since expired when he first heard about the subject from Judge Peckham strongly suggests that he lacked the actual knowledge required by the statute." Aguilar's argument ignores the plain language of section 2232(c). The statute imposes liability on anyone "having knowledge that a Federal investigative or law enforcement officer *has been authorized or has applied* for authorization" to conduct a wiretap. 18 U.S.C. § 2232(c) (1988) (emphasis added). This language makes it unlawful to reveal a wiretap with the wrongful purpose required by section 2232(c) although the authorization is no longer current.

The dissent, agreeing with Aguilar, invites us to read "has been authorized" as "is currently authorized." Although we find the statutory language standing alone sufficiently clear to rule out this construction, we note that the legislative history accompanying the enactment of section (c) also refutes this interpretation: the report describing the newly-created offense stated that the statute prohibits "giving notice of the possible interception to any person *who was or is* the target of the interception." S.Rep. No. 541, 99th Cong., 1st Sess., 1, 34 (1986) (em-

³ Contrary to the dissent's characterization, we do not conclude that Judge Aguilar had knowledge of the new wiretap on Chapman's telephone in effect during February 1988. See *post* at 636 (Hug, J., dissenting). Rather, we conclude that the evidence of his knowledge of the May 1987 wiretap on Tham's telephone is sufficient to support his conviction for the February 6 disclosure of that wiretap to Chapman, an interceptee of that wiretap.

phasis added), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3588.

Congress has set a limit upon the time during which a wiretap may remain secret. *See* 18 U.S.C. § 2518(8)(d) (1988). It has also provided for extensions of that time upon a showing of good cause. *See id.* We are not here confronted with a prosecution for disclosure of a wiretap after the government had already served notice of the wiretap upon the interceptee, which might raise more troubling questions of the nature posed by the dissent. In this case, although the specific wiretap of which Judge Aguilar had learned expired on May 20, 1987, the district court ordered its secrecy maintained through January, 1989. Moreover, other wiretaps were authorized in the interim; wiretaps for which Chapman was an interceptee were in place from September 11 to October 12, 1987, and from October 21, 1987, through May 8, 1988. Thus, at the time Aguilar warned Chapman of the surveillance, it was still lawfully secret.

The dissent reads the statute to require that a defendant must intend to impede the specific *unexpired* wiretap of which he has knowledge before he can violate the law. *See post* at 628, 629. This construction permits the disclosure of any expired wiretap authorization, regardless whether the wiretap is still secret and regardless whether the disclosure may impede ongoing undercover investigations. To interpret section 2232(c) to permit disclosure by third parties while the government has obtained judicial approval to maintain secrecy would defeat the purpose of section 2518(8)(d). It is unlikely Congress intended to permit judicially-authorized surveillance efforts to be frustrated by such a narrow reading of the statute. As such a reading is incompatible with the statutory language, we reject it.

The dissent's emphasis on the existence of some interception with which disclosure of the particular wiretap could potentially interfere is unduly concerned with the possibility of actual interference. We think that the statute's primary concern is with the giving of notice with specific intent to interfere with surveillance. That such notice may not actually, nor even possibly, impede the particular surveillance episode of which Aguilar learned from Judge Peckham is less important.⁴ Apart from the statutory language itself, this is evidenced by the fact that the statute also prohibits attempts to engage in such conduct.⁵

B. Freedom of Speech

Aguilar also argues that section 2232(c), by punishing him for speaking about the wiretap, violates his First Amendment right to free speech. We review constitutional challenges to statutes de novo. *United States v. Scampini*, 911 F.2d 350, 351 (9th Cir.1990).

⁴ We note that impossibility is generally not a defense to a crime. *See e.g., United States v. Quijada*, 588 F.2d 1253, 1255 (9th Cir.1978) ("generally, a defendant should be treated in accordance with the facts as he supposed them to be."). The fact that the particular wiretap had expired should not insulate Aguilar from his attempt to frustrate the surveillance effort, particularly where, as here, subsequent wiretaps were in place such that he accomplished his objective.

⁵ We fail to see the significance of the fact that Congress chose to forbid attempted disclosures in the same statute in which it forbade disclosure. *See post* at 636 (Hug, J., dissenting). We also note that "erroneous belief" as to the existence of a wiretap only permits a conviction under section 2232(c) when accompanied by the specific intent to impede an interception. *See* 18 U.S.C. § 2232(c). This "guilty belief" is equivalent to "knowledge" in the sense of subjective certainty; it may be objectively incorrect, but it is nonetheless culpable when coupled with the proscribed conduct of disclosure.

Aguilar does not dispute that if he had a duty to maintain the confidentiality of the wiretap application, he had no First Amendment right to disclose the application. See *Snepp v. United States*, 444 U.S. 507, 509 n. 3, 100 S.Ct. 763, 765 n. 3, 62 L.Ed.2d 704 (1980) (per curiam). Rather, he argues that section 2232(c) violates his First Amendment rights because he had no such duty. He contends, therefore, that the district court erred by refusing to instruct the jury that "knowledge [for] the purposes of 2232(c) must come from confidential information, information derived from the judge[']s employment." Failure to give this instruction, he argues, deprived him "of the right to have the factual dispute about whether the disclosure involved a breach of duty resolved by the jury." Aguilar maintains that had the jury been given the opportunity to consider this question, it would have found that he had no duty. The government could not have demonstrated the confidentiality of the information Aguilar received from Judge Peckham because it could not "articulate any conceivable relationship between the disclosure by Judge Peckham and Judge Aguilar's official duties."

The problem with Aguilar's argument is that it posits limits on his responsibilities as a federal judge that do not exist. It simply does not matter that Judge Peckham informed him of the wiretap at a cocktail party rather than in chambers, or some other "official" setting. Judge Aguilar had a duty not to disclose the information because it came from Judge Peckham and *related* to that official judicial business. The duty stemmed not from the place or time at which Judge Aguilar heard the information, but from the nature and source of the information.

In *Snepp* the Supreme Court considered whether a former CIA agent had a First Amendment right to publish a book on CIA activities in South Vietnam, based on

information learned during the course of his employment. The Court found that an agreement Snepp had signed with the CIA prohibited him from publishing without CIA approval. But the Court noted that "apart from the plain language of the agreement, the nature of Snepp's duties and his conceded access to confidential sources and materials could establish a trust relationship." 444 U.S. at 511 n. 6, 100 S.Ct. at 766 n. 6. The same can be said of federal judges. Every day, we discuss confidential court business with our colleagues and our staff. It is well understood we are not free to discuss these matters with the attorneys that appear before us, with our families, or with our friends outside the court. Although it is difficult to find authorities discussing the existence of a duty on the part of federal judges to guard the confidentiality of their communications with their colleagues, that is undoubtedly because "its existence and validity has been so universally recognized. Its source is rooted in history and gains added force from the constitutional separation of powers of the three departments of government." *Nixon v. Sirica*, 487 F.2d 700, 740 (D.C.Cir.1973) (MacKinnon, J., dissenting) (discussing existence of a privilege protecting disclosure of communications among judges).

Our conclusion about the nature of the judicial duty of confidentiality is backed by recognition that were it not for the existence of such a duty, Judge Aguilar would never have learned of the wiretap. Judge Peckham testified that he believed Judge Aguilar would keep the matter confidential. Surely he felt free to relate information about a wiretap application to Judge Aguilar only because he regarded the conversation as confidential. Judge Aguilar's access to the information regarding the wiretap was a consequence of his judicial position and he therefore had a duty not to disclose the information.

Several years ago, a special federal appeals panel held that communications among judges "relating to official judicial business" are protected by a qualified privilege. See *In re Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488, 1520 (11th Cir.), cert. denied, 477 U.S. 904, 106 S.Ct. 3273, 91 L.Ed.2d 563 (1986). The court did not restrict the privilege to information a judge discloses to his staff or colleagues during the course of his official duties. It held that the privilege protected material "relating to official judicial business." We see no reason to circumscribe the corresponding official duty of confidentiality more narrowly.

If we were to accept Aguilar's logic, we would have to conclude that a judge never has a duty to keep confidential the information he or she learns from other judges in a social setting. There is a range of internal matters that judges and courts jealously guard from the public eye. Aguilar's "official duties" limitation on his duty of confidentiality would permit judges to freely disgorge these matters if they were to learn about them over lunch with a colleague, or at a cocktail party at another judge's home. The spectre of such disclosure alone is enough to stifle discussion among the members of the federal judiciary and undermine the integrity of the Article III branch.

Aguilar argues, however, that his acquittal on court four, which charged him with disclosing the wiretap in August 1987, after he spoke with Judge Peckham but before he saw the FBI agent observing Chapman, demonstrates that the jury concluded that he gained the requisite knowledge from his observation of the agent, not his conversation with Judge Peckham. He argues that even if he had a duty not to disclose what he learned from Judge Peckham, he had no such duty not to disclose

what he learned from his own observation. We need not consider whether a federal judge's duty of confidentiality is limited in this manner, because there can be no doubt that Judge Aguilar's knowledge of the wiretap was based on what he learned from Judge Peckham. He himself said it.

Aguilar's nephew testified that when Aguilar informed him of the wiretap he said he had learned of the wiretap "at work." Indeed, the only sensible explanation for Judge Aguilar's knowledge is that when he saw the FBI agent trailing Chapman, he recalled his conversation with Judge Peckham and put two and two together; it is difficult to imagine how his observation of the FBI agent alone could have led him to conclude that Chapman's telephone had been tapped. If Judge Aguilar's knowledge were based even partially on what Judge Peckham told him, then he had a duty not to disclose it. The jury could have acquitted Judge Aguilar of count four for a number of reasons; there is no reason for us to conclude that it acquitted him because he lacked "knowledge." We decline Aguilar's invitation to draw conclusions about the jury's reasoning based on its decision to acquit him of count four.

Because Judge Aguilar had a duty not to disclose the wiretap, nothing in the First Amendment would prohibit the jury from applying section 2232(c) to his conduct.

C. Misstatement of the Knowledge Element

Aguilar argues that the court's definition of knowledge as the awareness of a "high probability" of the existence of a fact was improper. He contends that this definition describes an objective state of mind akin to "negligence." The definition, he suggests, conflicts with the "basic and widely understood" principle that knowledge is a subjective state of mind requiring "actual awareness" of a fact.

It is this "settled interpretation" of knowledge that Congress must have had in mind when it drafted section 2232(c), according to Aguilar. The definition used by the trial court, which Aguilar refers to alternatively as a "diluted" or "objective" standard of knowledge, is only appropriate when there is evidence that a defendant has consciously avoided learning an incriminating fact. If there is no such evidence, an instruction employing this definition creates the risk that the jury will convict the defendant for what he *should have* known, he argues. See *United States v. Garzon*, 688 F.2d 607, 609 (9th Cir.1982); *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1325 (9th Cir.1977). Because there was no evidence of "deliberate indifference" in this case, Aguilar maintains the government was required to prove that he possessed "actual knowledge." Whether a jury instruction misstates an element of an offense is a question of law that this court reviews de novo. *United States v. Spillone*, 879 F.2d 514, 525 (9th Cir.1989), *cert. denied*, 498 U.S. 878, 111 S.Ct. 210, 112 L.Ed.2d 170 (1990).

The Electronic Communications Privacy Act of 1986, Pub.L. No. 99-508, § 109, 100 Stat. 1858 (1986) ("the Act"), of which section 2232(c) is a part, is silent on the meaning of the statute's mens rea requirement. See 18 U.S.C. § 2510 (1988). Left without guidance from the statutory text, the trial judge turned to the legislative history and concluded that Congress had imported the Model Penal Code definition of "knowledge"⁶ into the Act. Although the legislative history is of little help in discern-

⁶ "(7) *Requirement of Knowledge Satisfied by Knowledge of High Probability*. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes it does not exist." Model Penal Code § 2.02(7) (Proposed Official Draft 1962).

ing Congress's intent,⁷ I conclude that the trial judge's definition was perfectly appropriate. The Model Penal Code view that one has knowledge of an attendant fact when one is "aware of a high probability of its existence" is as accurate a description of the subjective state of mind I call "knowledge" as any I can imagine.

I would reject the premise that Model Penal Code section 2.02(7) does not comport with traditional understandings of "knowledge." We have "actual" or "positive" knowledge of very few things we claim to "know." If we need a carton of milk, we go to the grocery store because we "know" there will be milk on the shelves. We slow down before we reach a yellow traffic light because we "know" that by the time we reach the light it will have turned red. Willie Sutton robbed banks because, to paraphrase the legendary thief, he "knew" the money was there. One could conceive of countless similar examples of facts we "know," not because we have actual knowledge of their correctness—knowledge that comes only when we arrive at the dairy section, when the light turns red, or when we enter the bank safe—but because we are "aware of a high probability" that the fact exists. And despite

⁷ A passage in the House Report on the Act states that section 2232(c) requires "that the defendant have knowledge that the federal law enforcement or investigative officer has been authorized to or has applied for an interception order." H.R.Rep. No. 647, 99th Cong., 2d Sess. 1, 60 (1986). The word "knowledge" is footnoted "[s]ee House Report 96-1396, Criminal Code Revision Act of 1980, at 32-36." *Id.* at 60 n. 91. The cited pages describe the mens rea requirements of the Model Penal Code, which were to have been adopted as part of the 1980 reform proposal. See H.R.Rep. No. 1396, 96th Cong., 2d Sess. 1, 32-36 (1980). The Report does not resolve the question at issue here—whether Congress believed that definition should apply in cases where "deliberate ignorance" is not an issue. See *id.* at 35-36.

Aguilar's contention, this state of mind differs from "actual knowledge" only in degree, not in kind. It is a *subjective* belief based on fact.

Courts have long recognized that "actual awareness" is only a subset of what we commonly think of as "knowledge." " 'Absolute knowledge can be had of very few things,' . . . and the philosopher might add 'if any.' For most practical purposes 'knowledge' is not confined to what we have personally observed or to what we have evolved by our own cognitive faculties." Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 865 (3d ed. 1982) (quoting *Story v. Buffum*, 90 Mass. 35, 38 (1864) and *State v. Ransberger*, 106 Mo. 135, 17 S.W. 290, 292 (1891)). Indeed, courts have often employed a definition of "knowledge" less demanding than that of the Model Penal Code. Courts routinely hold that a defendant may satisfy the "knowledge" requirement for the crime of receipt of stolen goods if he merely has a "guilty belief" that the goods are stolen. *See id.* at 865-75.

Professor Perkins notes that the law will view the requirement of "knowledge" differently in different circumstances. He gives the example of a person who has been told that a certain bill of exchange is a forgery and believes the statement to be true. "Obviously [the person does not have 'knowledge' of the forgery] if the purpose of the inquiry is to determine whether he is qualified to take the witness stand and swear that the instrument is false; but if he passes the bill as genuine he will be uttering a forged instrument with 'knowledge' of the forgery if his belief is correct." *Id.* Likewise, it would make no sense for courts to require that violators of section 2232(c) have the same degree of knowledge that they would require of witnesses. Judge Aguilar would not be qualified to testify that a wiretap application had been submitted unless he had

witnessed the application. But if that degree of "knowledge" was required for prosecution under section 2232(c), then only the FBI agent and United States Attorney who applied for the wiretap and the judge who granted it could be subject to prosecution, and that surely is not what Congress intended to be the coverage of the statute.

Despite all this, Aguilar argues that the drafters of the Model Penal Code conceived of section 2.02(7) not as a definition of knowledge, but as an exception to the traditional requirement of "actual" knowledge applicable only when there is evidence that a defendant has remained deliberately ignorant of a fact. He suggests that courts have ratified this limitation. Nothing in the text of section 2.02(7) even implies the limitation Aguilar proposes. Aguilar, however, fastens onto the commentary to section 2.02, which states that "[s]ubsection (7) deals with the situation that British commentators have denominated as 'willful blindness.'" Model Penal Code § 2.02 comment 9 (Proposed Official Draft 1962). A more thorough reading of the comment reveals that the drafters did not conceive of subsection (7) as an *exception* to the knowledge requirement applicable only when "willful blindness" is an issue, but rather as a comprehensive *definition* of knowledge designed to account for "willful blindness." "The inference of 'knowledge' of an existing fact is *usually* drawn from proof of notice of high probability of its existence, unless the defendant establishes an honest, contrary belief. Subsection (7) solidifies this *usual* result and clarifies the terms in which the issue is submitted to the jury." *Id.* (emphasis added). Read in its entirety, the meaning of comment 9 is clear: section 2.02(7) was designed to incorporate the concept of "willful blindness" into a general definition of knowledge that would limit the equation of "willful

blindness" to "knowledge" to circumstances in which the defendant really did have knowledge. See Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* § 3.5(b), at 307-08 (1986) ("The Model Penal Code requirement of an awareness of a high probability of the existence of the fact serves to ensure that the purpose to avoid learning the truth is culpable.").

This circuit first adopted the Model Penal Code definition in *United States v. Jewell*, 532 F.2d 697 (9th Cir.) (en banc), cert. denied, 426 U.S. 951, 96 S.Ct. 3173, 49 L.Ed.2d 1188 (1976). There we recognized that section 2.02(7) purported to be a general definition of knowledge and we approved of it as such. "[I]n common understanding one 'knows' facts of which he is less than absolutely certain. To act 'knowingly,' therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question." *Id.* at 700. Judge (now Justice) Kennedy, writing for the dissent, agreed that section 2.02(7) is "a definition of knowledge, not a substitute for it." *Id.* at 707 (Kennedy, J., dissenting); see also *United States v. Yermian*, 708 F.2d 365, 371-72 (9th Cir.1983) (recognizing the Model Penal Code definition as the "subjective standard of criminal knowledge required by this circuit"), rev'd on other grounds, 468 U.S. 63, 104 S.Ct. 2936, 82 L.Ed.2d 53 (1984); 2 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 54.15, at 923 (1990) (citing *Jewell* for proposition that in drug possession crimes, "[a] defendant does not have to act with positive knowledge in order to be culpable. It is sufficient if the defendant acts with an awareness of the high probability of the fact in question.").

The Supreme Court's approval of section 2.02(7) as a general definition of knowledge is clear from its use of

the definition in cases in which "willful blindness" was not an issue. In *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), the Court considered the constitutionality of a presumption in 21 U.S.C. § 176a that evidence sufficient to show that a defendant possessed marijuana is also sufficient to show that the defendant knew the marijuana was illegally imported. The Court employed section 2.02(7) to interpret the meaning of "knowing" in the statute. See *id.* at 46 n. 93, 89 S.Ct. at 1553; see also *Barnes v. United States*, 412 U.S. 837, 845, 93 S.Ct. 2357, 2363, 37 L.Ed.2d 380 (1973) (considering constitutionality of inference of knowledge from possession of stolen goods and upholding defendant's conviction for possession of stolen Treasury checks on ground that the evidence could support finding that defendant "must have known or been aware of a high probability that the checks were stolen"); *Turner v. United States*, 396 U.S. 398, 416, 90 S.Ct. 642, 652, 24 L.Ed.2d 610 (1970) (relying on section 2.02(7) definition to interpret knowledge presumption in federal drug possession statute, 21 U.S.C. § 174); *United States v. Hester*, 890 F.2d 799, 803 n. 4 (4th Cir.1989) ("[T]he Court has indicated general acceptance of the proposition that awareness of 'a high probability' that a fact exists may properly be equated with 'knowledge' in the interpretation of criminal statutes.") (citing *Leary*, 395 U.S. at 46 n. 93, 89 S.Ct. at 1553 n. 93).

Aguilar nevertheless argues that if applied where there is no evidence of "willful blindness," the Model Penal Code definition *by itself* implies a duty on the part of a defendant to learn a fact and therefore creates the risk that the defendant will be convicted for what he should have known. Aguilar relies on a line of cases holding that because a "willful blindness" instruction—which includes but is not limited to the Model Penal Code definition—

carries with it the risk that the jury will evaluate the defendant's behavior under a negligence standard and convict him for what he should have known, it should only be given in the rare case in which there is evidence that the defendant deliberately avoided learning the truth. *See e.g., United States v. Sanchez-Robles*, 927 F.2d 1070, 1073-75 (9th Cir.1991); *Garzon*, 688 F.2d at 609; *Murrieta-Bejarano*, 552 F.2d at 1325.

The risk identified by *Murrieta-Bejarano* and its progeny was never present in this case. That risk is created when an instruction that a defendant's conscious effort to avoid the truth is the equivalent of knowledge is given in a case where there is no evidence that the defendant did indeed consciously avoid learning the truth. In such a case, there is a risk that the jury will conclude that the defendant had some duty to inquire about the existence of the fact, if a reasonable person would have done so. *See Garzon*, 688 F.2d at 609. It is the instruction on conscious avoidance, not the Model Penal Code definition of knowledge which must accompany it, that implies the existence of a duty. In this case the district court did not instruct the jury on "conscious avoidance."

The Model Penal Code definition of knowledge standing alone implies no duty to discover facts. Contrary to Aguilar's argument, the definition describes a subjective state of mind, and therefore cannot subject a defendant to liability for negligence.⁸ *See Yermian*, 708 F.2d at 372 (subsection (7) as the "'subjective' standard of criminal knowledge required by this circuit"); Ira P. Robbins, *The Ostrich Instruction: Deliberate Indifference as a Criminal Mens Rea*, 81 J.Crim.L. & Criminology 191, 227 (1990)

⁸ Even the dissent recognizes that the knowledge instruction imposed a subjective standard. *See post* at 634-35 (Hug, J., dissenting).

("[T]he Model Penal Code formulation protect[s] the defendant from conviction for merely negligent behavior."). Indeed, the "balancing clause" of the definition, which instructs the jury that a defendant does not have knowledge if he "actually believes [the fact] does not exist," ensures that the defendant is not convicted for negligence. *United States v. Esquer-Gomez*, 550 F.2d 1231, 1235-36 (9th Cir.1977).

I would hold that the trial court did not err by instructing the jury that a person has knowledge if he is "aware of a high probability that a fact exists, unless he actually believes it does not exist." The definition describes a subjective state of mind and creates no risk that the defendant will be convicted for what he "should have known." Indeed it perfectly describes the state of mind that lay people typically regard as knowledge, that best fits the purpose of section 2232(c), and that this circuit and the Supreme Court have approved as a general definition of "knowledge." We conclude as well that the evidence of Judge Aguilar's "knowledge" was so substantial, that had the jury received no instruction, it would still have found that Judge Aguilar had knowledge of the wiretap.⁹ We need not be concerned that the instruction might have allowed the jury to convict Aguilar "even if he was uncer-

⁹ It seems to be the typical practice of judges on this circuit not to give any definition of "knowledge." The Ninth Circuit Model Jury Instructions do not include an instruction defining knowledge. And we have previously held that it is not error for a court not to define "knowingly." "The word is a common word which an average juror can understand and which the average juror could have applied to the facts of this case without difficulty." *United States v. Chambers*, 918 F.2d 1455, 1460 (9th Cir. 1990). As I have already indicated, I believe the average juror's understanding of "knowledge" comports with the instruction given in this case.

tain about whether there was a wiretap," as the dissent fears, since the evidence reflected no uncertainty: Judge Aguilar himself admitted in tape recorded conversations with Solomon that he "knew". If the instruction were error, it was harmless beyond a reasonable doubt in the face of Aguilar's admissions of knowledge.¹⁰

D. Burden of Proof

Aguilar next argues that the jury instructions on knowledge unconstitutionally shifted the burden of proof onto him in violation of due process. Aguilar first raised his constitutional objection to the court's "knowledge" instruction in his motion for a new trial. When there is no objection to a jury instruction at trial, this Court reviews the instruction for plain error. *United States v. Bustillo*, 789 F.2d 1364, 1367 (9th Cir.1986). "A plain error is a

¹⁰ The dissent finds a serious factual question as to what Aguilar knew and what he merely suspected. *Post* at 635. It is impossible for a jury to know the strength of certainty with which a belief is held, which may run the continuum from doubt to suspicion to belief to certainty, except by what is manifested objectively. I do not believe the jury was required to disbelieve what Aguilar *said* he knew and find that he could not actually have known it. Judge Aguilar's contention that Aguilar could not have known a fact that did not exist, *see post* at 635-36, suggests that his concern is not with the knowledge instruction; rather, it is with the notion that Aguilar's crime is a factual impossibility. When disclosure of actual surveillance efforts occurs, the specific intent to frustrate surveillance efforts exists, and there is subjective belief in the existence of attendant circumstances that makes the conduct and intent criminal, any error as to that belief does not relieve the act of its culpability. Thus the drug dealer who sells soap powder mistakenly "knowing" it to be heroin is guilty. *See Quijada*, 588 F.2d at 1255 (citing *United States v. Roman*, 356 F.Supp. 434, 438 (S.D.N.Y.), *aff'd*, 484 F.2d 1271 (2d Cir. 1973), *cert. denied*, 415 U.S. 978, 94 S.Ct. 1565, 39 L.Ed.2d 874 (1974)).

highly prejudicial error affecting substantial rights." *Id.*

In *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), the Supreme Court held that a jury instruction stating that " 'the law presumes that a person intends the ordinary consequences of his voluntary acts,' violates the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt." *Id.* at 512, 99 S.Ct. at 2453. A jury could interpret such an instruction as shifting the burden of proof to the defendant. *Id.* at 524, 99 S.Ct. at 2459.

Aguilar argues that the last clause of the trial court's instruction on "knowledge" had the same effect as the instruction in *Sandstrom*. The district court instructed the jury that

[k]nowledge of the evidence of a particular circumstance may be satisfied by proof that the defendant was aware of a high probability of the existence of that circumstance[,], *unless you find from the evidence that the defendant actually believed that the circumstance did not exist.*

(emphasis added).

In *Esquer-Gomez*, we held that the "balancing clause" of the Model Penal Code definition is necessary to protect the defendant against the risk that he will be convicted for what he "should have known." *See* 550 F.2d at 1235-36. In *United States v. Hogg*, 670 F.2d 1358 (4th Cir.1982), however, the Fourth Circuit held that a nearly identical instruction violated *Sandstrom*. That court concluded that a reasonable jury could interpret the instruction to mean that "once the government shows that the defendants knew [the circumstance] probably existed, the defendants must introduce more than some evidence that they had no actual knowledge to avoid a finding against them on this element." *Id.* at 1363-64. It held that

Sandstrom "prohibits such a persuasion-shifting instruction." *Id.* at 1364.

I disagree that the reasoning of *Sandstrom* supports the holding of *Hogg*. In *Sandstrom*, the Court found that an instruction that the law presumes a person to intend the consequences of his acts could have shifted the burden of proof on the element of intent to the defendant: The jury "could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was shifted to the defendant to prove that he lacked the requisite mental state." 442 U.S. at 524, 99 S.Ct. at 2459.

The instruction given in this case could have no such effect because it did not create a presumption that the defendant had to overcome. The function of the balancing clause is to ensure that the jury does not hold the defendant responsible for what a reasonable person would know, if in fact the defendant actually believed the fact did not exist. It directs the jury to focus on the defendant's actual belief, nothing more. The clause does not imply anything about whose burden it is to prove the defendant's state of mind. Here, the district court stated unequivocally that the government had to prove that Aguilar was aware of a high probability that the wiretap application existed. The balancing clause in no way lightened that burden.

Furthermore, even if the instruction itself were faulty, which I believe is not so, we do not consider jury instructions in isolation, but rather in the context of the other instructions given. *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1412 (9th Cir.1986). We have held that reminders that the government has the burden of proving every element of the crime beyond a reasonable doubt are sufficient to cure instructions that might otherwise shift the burden of proof. *See United States v. Wyatt*, 807 F.2d

1480, 1481-82 (9th Cir.), *cert. denied*, 484 U.S. 858, 108 S.Ct. 170, 98 L.Ed.2d 124 (1987). Considered in context, the knowledge instruction hardly could have led a reasonable juror to conclude that Judge Aguilar had the burden of proving his lack of knowledge. The jury was reminded repeatedly that the government was required to prove every element of the offense beyond a reasonable doubt. And, as we have said, the evidence of Judge Aguilar's knowledge, coming as it did from his own mouth, was overwhelming. Because the jury was cautioned about the government's burden, and because the evidence was so weighty, the instruction could not have been "highly prejudicial" and therefore was not plain error.

For the foregoing reasons, I would reject each of Judge Aguilar's objections to his conviction under section 2232(c); moreover, we conclude that any possible error was harmless beyond a reasonable doubt. *See post* at 641 (O'Scannlain, J., concurring).

III

OBSTRUCTION OF JUSTICE

The judicial obstruction statute, 18 U.S.C. § 1503,¹¹ also contains a "knowledge" component. Though the text of the statute prescribes no scienter requirement, this circuit has held that knowledge of a judicial proceeding is an element of a section 1503 offense. *See United States v. Washington Water Power Co.*, 793 F.2d 1079, 1084 (9th Cir. 1986); *United States v. Rasheed*, 663 F.2d 843, 852

¹¹ Whoever . . . corruptly or by threats or force, or by any threatening letter or communication . . . endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1503 (1988).

(9th Cir. 1981), *cert. denied*, 454 U.S. 1157, 102 S.Ct. 1031, 71 L.Ed.2d 315 (1982). The trial court, therefore, instructed the jury that "there must be knowledge of the existence of a judicial proceeding before a defendant can be convicted of this offense." It then defined knowledge in precisely the same terms it had used in the wiretap instruction.

Aguilar challenges his conviction under section 1503 on the ground that the evidence was insufficient to show that he had knowledge that the FBI agents to whom he lied would be witnesses before a grand jury. He also raises the same objections to the court's instruction on "knowledge" that he raised with respect to section 2232(c). For the same reasons that I would hold that the instruction on the "knowledge" element of section 2232(c) properly defined knowledge and did not violate due process, I would hold that the instruction on the knowledge element of section 1503 was also proper. A majority of this panel having concluded otherwise, a decision from which I respectfully dissent, this conviction will be reversed and we do not reach the question of the sufficiency of the evidence. Were it necessary to do so, I would also hold there was sufficient evidence for a rational jury to find Aguilar knew that FBI agent Carlon was expected to be a witness in front of the grand jury. Judge Aguilar clearly knew that a grand jury was meeting, he repeatedly questioned the agents about whether he was a target, and he testified about how grand jury investigations operate, which demonstrated to the jury his ability to correctly determine both his own status and the purpose of the interview. A reasonable jury could have found that a federal judge, sophisticated on the subject of grand jury investigations, who knew that a grand jury was in session and who "was aware of a high probability" that he was a target of its investigation, also knew that Agent Carlon would be expected to testify before the

grand jury about Aguilar's statements to him. I therefore would uphold Aguilar's conviction for violating section 1503.

IV

DEPARTURE FROM THE SENTENCING GUIDELINES

We agree that at a minimum, the district court failed to provide a reasoned explanation for its six-level downward departure, and I concur in Judge O'Scannlain's opinion to that extent. I most vigorously dissent, however, from the conclusion that the district court had the legal authority to depart downward on the basis it did.

The mitigating circumstance upon which the district court based its downward departure was the "additional punishment" it anticipated Judge Aguilar would suffer during the course of potential disbarment and impeachment hearings. The plurality acknowledges that the Guidelines account for impeachment, but concludes that the Guidelines do not account for "the likelihood that Judge Aguilar will suffer additional punishment throughout the course of several disciplinary hearings." *Post* at 643-44 (O'Scannlain, J., concurring). The plurality then concludes that the district court had legal authority to depart on this basis, a conclusion I find insupportable.

First, and most fundamentally, departures prompted by the substantial pain and humiliation or financial hardship those in high places suffer when they break the law is inconsistent with the Guidelines' policy that disparity in sentencing should never be occasioned by socio-economic status. *See* 28 U.S.C. § 994(d) (1988); U.S.S.G. Ch. 1 Pt. A 4(b) & § 5H1.10.¹² The district court emphasized that

¹² Where most defendant characteristics are deemed "not ordinarily relevant," socio-economic status is flatly "not relevant." Thus,

its willingness to depart "is limited only to those features that I believe are so different and unique with this defendant." It concluded that these features would be "so extensive and so enduring" that they formed an appropriate basis for departure. But there is no escaping the conclusion that the court's departure was grounded in the notion that the consequences that accrue when someone who holds a position of high esteem and importance violates the law are uniquely significant and harsh. Though the court recognized that collateral consequences arising from a criminal defendant's social and professional stature are inappropriate bases for departure, it did not seem to realize that its departure was grounded in precisely such considerations. With respect, I must say that a plurality of this panel now makes the same error.

Second, the circumstance upon which the district court based its departure is, regretfully, not all that unique. The Sentencing Guidelines' policy statement on departures states that courts should depart only in the "atypical" case. See U.S.S.G. Ch. 1, Pt. A 4(b); cf. *United States v.*

although some offender characteristics may be taken into account where not adequately considered by the Guidelines, socio-economic status is not one of these. The plurality's suggestion to the contrary is troubling. See *post* at 627 n. 2. To the extent that *United States v. Valdez-Gonzalez*, 957 F.2d 643 (9th Cir. 1992), stands for the proposition that a court may consider socio-economic "factors," as opposed to "status," it should be noted that (1) the "factors" considered therein were "the socioeconomics and the internal politics of the drug trade along the Mexican border," 957 F.2d at 649, not factors unique to the defendants' personal situations; (2) the court looked to socioeconomic factors *not* as a basis for departure, but in evaluating an otherwise permissible factor (role in the offense); and (3) the departures were at least consistent with the Guidelines, paralleling downward adjustments the defendants would have received under section 3B1.2 had the other participants in their crimes been indicted. See 957 F.2d at 648. *Valdez-Gonzalez* is surely no support for the result in this case.

Anders, 956 F.2d 907, 912 (9th Cir. 1992) (factors "not ordinarily relevant" may be considered only in "extraordinary circumstances"), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1592, 123 L.Ed.2d 158 (1993). The kind of additional humiliation and suffering Judge Aguilar will suffer, while not common, is not "atypical." The district court's reasoning would apply to many well-known figures in the worlds of government and finance who have been prosecuted over the last twenty years. I cannot accept the notion that the humiliation of disbarment or impeachment proceedings is different in kind or degree from the humiliation, shame and stigma borne by numerous other respected community members convicted of serious crimes.¹³

No one disputes that Judge Aguilar's job accounts for the collateral consequences he now faces in the form of "long, humiliating, and burdensome" proceedings of disbarment and impeachment, as well as loss of pension benefits and preclusion from public service. See *post* at 643-44.¹⁴ The plurality finds this permissible, however, because a departure on the basis of Judge Aguilar's job is not based on the judge's "status in society." *Id.* The plurality's own support refutes this notion: "the phrase 'socio-economic status' refers to an individual's status in society as determined by objective criteria such as education, income, and employment." *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C.Cir. 1991) (emphasis added). In

¹³ Nor can I accept the plurality's implication that Judge Aguilar's suffering is rendered unique by his status as an "Article III" judge. Whether Aguilar is a federal, state, municipal, or traffic court judge is irrelevant and does not render his circumstances "atypical."

¹⁴ The plurality characterizes this as "extra punishment," *post* at 644, and perhaps rightfully so. But it is a far cry from solitary confinement in prison, the only instance of extra punishment held to warrant downward departure. See *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990).

our society, rightly or wrongly, one's job is often equivalent to one's status in society. What is more, the plurality buttresses its conclusion that departure on the basis of Aguilar's job is permissible on the additional basis that Judge Aguilar stands to lose his pension too. *See post* at 644-45. How one could assert that financial ramifications of conviction is not a socio-economic factor is beyond comprehension.

A criminal conviction may mean a loss of current position and foreclosure of future professions or positions for many defendants. Professionals in the securities industry, once convicted of violating the securities laws, lose their brokers' licenses in quasi-judicial proceedings not unlike disbarment, and thereafter are barred from holding certain positions in the securities industry. *See* 15 U.S.C. § 78o(a), (b)(4) (1988). Likewise, persons convicted of certain offenses are barred from holding positions within a labor union or pension plan, *see* 29 U.S.C. §§ 504(a), 1111 (1988)—ironically, the genesis of Rudy Tham's solicitation of Judge Aguilar's influence and this case. I doubt any court would support a downward departure for a securities broker convicted of insider trading violations on the ground that she faced a burdensome civil liability proceeding, stood to lose her broker's license, would be barred from registering as a securities broker or dealer in the future, had to disgorge her profits, and suffered extreme public humiliation as she was drummed out of Wall Street. I cannot see that Judge Aguilar's position is so different.

The Guidelines' policy is that "persons who abuse their positions of trust . . . generally are viewed as more culpable." U.S.S.G. § 3B1.3 comment. (backg'd). We must assume that the Sentencing Commission has adequately considered the special circumstances of defendants who hold high office, and rejected any notion that such persons should receive more lenient treatment. The district court's

departure on the basis of consequences flowing from Judge Aguilar's breach of the public trust flies in the face of the Guidelines' policy. Collateral consequences of conviction arising from or affecting one's job simply are not a permissible basis for departure. *See United States v. Rutana*, 932 F.2d 1155, 1158-59 (6th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 300, 116 L.Ed.2d 243 (1991).

"A long course of adversarial proceedings" awaits many a defendant following criminal conviction—be they forfeiture proceedings, civil suits seeking tort damages, or administrative proceedings to revoke professional licenses. These suits are burdensome in themselves, and their consequences can be exceedingly onerous. Defendants can lose their homes, investments, businesses, and entire estates in forfeiture proceedings following conviction of drug or racketeering offenses, or can be hit with staggering civil damage awards for many white collar crimes. Judge Aguilar's potential forfeiture of his pension rights is no different. Personal financial hardship is not a permissible basis for downward departure. U.S.S.G. § 5K2.12.

The plurality's statement that the 'extra punishment' Judge Aguilar faces "can be distinguished" from other collateral effects arising from conviction, *see post* at 644 n. 3, is not convincing. First, the plurality addresses only deportation; the collateral effects more comparable to what Judge Aguilar faces are personal financial hardship and foreclosure of career opportunities. I submit that despite the fact that deportation "is not considered punitive," its "undeniable impact" is far more punitive than mere loss of position. For that matter, disbarment is not considered punitive either:

It must be noted that although the word 'punishment' is frequently used, the discipline of an attorney is not punitive in character. . . . The purpose of such a pro-

ceeding is to determine the fitness of an officer of the court to continue in that capacity, and it has been said the disbarment of attorneys is not intended for the punishment of the individual, but for the protection of the courts and the legal profession.

Marsh v. State Bar, 2 Cal.2d 75, 39 P.2d 403, 405 (1934); accord *In re Lavine*, 126 F.Supp. 39, 48 (S.D.Cal. 1954), rev'd on other grounds, 217 F.2d 190 (9th Cir. 1954); *United States ex rel. Fitzgerald v. Stump*, 112 F.Supp. 236, 237 (D.Alaska 1953).

Second, because deportation is a normal collateral consequence of conviction for a drug offense, the plurality assumes the Sentencing Commission adequately considered it in determining the appropriate offense level for drug crimes. Apart from the fact that this logic is fallacious—the offense levels for drug convictions were set for aliens and citizens alike, so the consequence of deportation could not possibly be reflected in the offense level for drug crimes—the same reasoning would apply here: disbarment as a consequence of a serious criminal conviction is not rare, and indeed ought to follow as a matter of course. *In re Quimby*, 359 F.2d 257, 258 (D.C.Cir. 1966) (per curiam). Accordingly, by the plurality's logic, we should assume the Sentencing Commission adequately allowed for that circumstance in determining offense levels.

Of course, we need not rely on fictional assumptions since the Commission expressly considered the factors upon which the district court seeks to depart—and pronounced each of them either irrelevant, see U.S.S.G. §§ 5H1.10 (socio-economic status), 5H1.11 (public service), or a basis for *harsher* treatment, cf. *id.* §§ 3B1.3 (court must adjust upward for abuse of position of trust); 5E1.4 (court must impose forfeiture upon convicted defendant as provided by law).

In short, I see no meaningful distinction, either qualitative or quantitative, between the additional "punishment" Judge Aguilar faces and that suffered by hundreds of convicted criminals. The plurality states that Judge Aguilar's case "does not appear to fall within the heartland of cases for which the Guidelines were designed." *Post* at 645. Judge Aguilar's case—his conduct and offense of conviction—is not at issue here. What the plurality of course means is that Judge Aguilar's personal circumstances are not those of the average defendant, and because of those circumstances, the Guideline sentence for Judge Aguilar's offense appears unduly harsh. That assessment is equally true for hundreds of decent and sympathetic defendants now serving time in federal prisons. The response to this severity cannot take the form of special justice simply because Judge Aguilar is "the first convicted federal judge" upon whom it will be visited.

When a high-ranking member of the judiciary, especially a respected and popular judge, is arrested for a serious crime, the entire judicial system is placed on trial. The world waits to see if judges can judge other judges fairly and equally.

Alan M. Dershowitz, *Justice on Trial*, N.Y. Times, Nov. 18, 1992, at A27. No judge can be treated more leniently than would a non-judicial defendant in a comparable case. To accord Judge Aguilar special consideration on the basis of his position is to violate the fundamental premise not only of the Guidelines, but of this nation: equal justice for all.

The circumstance upon which the court based its departure was inconsistent with the rules and policies of the Sentencing Guidelines and therefore in violation of 18 U.S.C. § 3553(b) as interpreted by this Court in *Lira-*

Barraza.¹⁵ I would hold that the district court, on remand, may not depart downward on the basis of consequences stemming from Aguilar's judicial position.¹⁶

Conclusion

In sum, we hold that the evidence was sufficient for a rational jury to find that Judge Aguilar had knowledge of the wiretap, and that the use of section 2232(c) to punish Judge Aguilar for disclosing the wiretap did not violate his rights under the First Amendment. Judge Aguilar's conviction for violating 18 U.S.C. § 2232(c) is therefore AFFIRMED. I would also hold that the jury instruction did not misstate the "knowledge" element of section 2232(c) and that the instruction did not unconstitutionally shift the burden of proof.

I would also hold that the evidence was sufficient for a rational jury to find Judge Aguilar had knowledge that Agent Carlon would be a witness before the grand jury, that the jury instruction did not misstate the "knowledge" element of section 1503, and that the instruction did not unconstitutionally shift the burden of proof. I therefore respectfully dissent from the panel's decision that Judge Aguilar's conviction for violating 18 U.S.C. § 1503 must be REVERSED.

¹⁵ Even if I were to conclude that it were permissible for the court to depart, I doubt that a *six* level downward departure was justifiable. A district court must consider the validity of *each* level of departure. See *Lira-Barraza*, 941 F.2d at 748. The court must also provide a statement explaining and justifying the departure. See *id.* at 751. The district court jumped six levels without explanation. It is difficult to imagine how such an extensive departure could be justified by reference to the structure of the Guidelines.

¹⁶ I do not find it troubling that a more severe sentence should be imposed on remand despite the reversal of one count of conviction. This results from the district court's failure to comply with the Guidelines in the first instance.

On the government's cross appeal, we hold that the district court failed to include a reasoned explanation of the extent of its departure as required by *Lira-Barraza*. Judge Aguilar's sentence is therefore VACATED and the case is REMANDED to the district court for resentencing. I would also hold that the district court lacked authority to depart downward from the offense level prescribed by the Sentencing Guidelines based on the additional "punishment" awaiting Aguilar. I most vigorously dissent from the panel's contrary decision.

See p. 626 for dissent by Judge Hug and special concurrence by Judge O'Scannlain.

HUG, Circuit Judge, dissenting, but concurring in Part II of Judge O'SCANNLAIN'S opinion.¹

I respectfully dissent. It is important to keep in mind that Judge Aguilar was acquitted of the charge that was the major focus of this trial—the charge of conspiracy to influence Judge Weigel concerning a case pending in his court. Judge Aguilar was convicted of two peripheral charges that, in my opinion, cannot be sustained. The statutes that form the basis for these charges have to be stretched far beyond their intended application to be made applicable to the facts of this case. I would reverse both charges on the ground of insufficiency of the evidence because the facts of this case, viewed in the light most favorable to the Government, simply do not meet the statutory requirements for conviction.

Moreover, I would reverse both convictions, even if the evidence were deemed to be sufficient, on the ground that

¹ Because I am convinced that the convictions on both counts should be reversed, I conclude that there should be no sentence at all. However, the combined opinions of Judge Hall and Judge O'Scannlain affirm the conviction on Count Six. I am thus required to rule on the sentencing issue. I concur in Part II of Judge O'Scannlain's opinion.

the district judge gave an erroneous knowledge instruction. Knowledge of certain essential facts was an element of both of the crimes of which Judge Aguilar was convicted. The instruction on knowledge that was given by the court permitted the jury to convict on a finding that there was a "high probability" that Judge Aguilar knew the crucial facts, rather than that he was actually aware of the crucial facts. This is a serious departure from the precedent in our circuit on the requirement of knowledge. The instruction given was one that is intended for a case where a "deliberate blindness" instruction is justified. We have carefully circumscribed the situation in which such an instruction can be given. Primarily, the instruction has been used in drug or alien smuggling cases, where the facts justify a finding that there was a high probability that the defendant knew what was going on and deliberately chose not to find out. Thus, the defendant was maintaining a "deliberate blindness," sometimes designated as a "deliberate ignorance." There are no facts that justify such a finding in this case. The Government does not even contend that this is a "deliberate blindness" case. Rather, the Government contends, and Judge Hall's opinion accepts the proposition, that this "high probability" instruction is an appropriate definition of knowledge in all cases.

This erroneous instruction to the jury on an essential element of both crimes cannot be overlooked as being harmless beyond a reasonable doubt. There was clearly a genuine factual issue as to whether Judge Aguilar had the requisite knowledge in each count. Whether the jury was required to find that Judge Aguilar *knew* of the existence of the essential facts or was *only aware of the high probability* of their existence could make a crucial difference. The error was not harmless.²

² When the three separate opinions of this panel are combined, it develops that the conviction on Count Eight for obstruction of justice

I. FACTS

Because Judge Aguilar was acquitted of the main charge of conspiracy to influence Judge Weigel, it is fair to view the facts related to this charge from Judge Aguilar's perspective, as the jury apparently did.

Abe Chapman is related to the Aguilar family by marriage. He is the step-grandfather of Judge Aguilar's nephew, Steve Aguilar. Although Judge Hall's opinion describes Abe Chapman in sinister tones, from Judge Aguilar's perspective he was an alcoholic, semi-senile 83-year-old man whom the family often referred to as "Mr. Magoo."

Chapman wanted to help his friend Rudy Tham, who had been a labor leader, had been convicted of embezzling \$2,000, had served six months, and was then on supervised release. Tham sought to overturn his conviction in a 28 U.S.C. § 2255 proceeding so that he could resume his position as an officer of the local union that he had formed and organized. Chapman and Tham's attorney, Edward Solomon, sought Judge Aguilar's help. Chapman and Solomon wanted Judge Aguilar to attempt to improperly influence Judge Weigel in his ruling on this section 2255 petition. However, the jury found that Judge Aguilar did not do so and did not ever agree to do so. Judge Weigel, a highly respected senior district judge, firmly testified that Judge Aguilar made no attempt to influence him in the *Tham* case.

is reversed, and the conviction on Count Six for wiretap disclosure is affirmed. Although Judge O'Scannlain and I conclude that the knowledge instruction incorrectly stated the law, Judge Hall and Judge O'Scannlain conclude that the error is harmless beyond a reasonable doubt. The conviction on Count Six, therefore, hangs on the harmless error determination, which I discuss in Part II D.

Judge Aguilar testified:

In a 2255 petition or other petition, you talk about the procedural matters, how to get the matter to court. And that's what I was talking about with them, about how to get this vehicle to court and how to get this matter before the judge, and I never discussed with them at any time the merits of the case. I wasn't concerned with the merits of the case. My concern was only helping them on what they should do procedurally.

There is no doubt that Judge Aguilar should not have put himself in the position of giving legal advice in a case pending before a fellow district judge. This is inappropriate for a judge and may well be a violation of judicial ethics, but it is not a crime. As the jury acquitted Judge Aguilar of the conspiracy charge, it was obviously satisfied with this explanation.

Judge Aguilar also was acquitted of the charge that he obstructed justice by trying to influence Solomon to testify falsely before a grand jury. It is important to note that the evidence related to this charge, quoted in Judge Hall's opinion, must be viewed in the light that Judge Aguilar was acquitted of this charge.

The foregoing discussion is intended to allow me to focus on the specific facts of the charges of which Judge Aguilar was convicted, without our decision being colored by the facts of the charges of which he was acquitted. I now turn to the specific charges of which Judge Aguilar was convicted and the facts involved in those charges.

II. WIRETAP CHARGE

A. *Summary of Reasons for Reversal*

As previously mentioned, there are two reasons why the wiretap charge under 18 U.S.C. § 2232(c) (1988) cannot be sustained. The first is the insufficiency of the evidence under the statute as it must properly be interpreted. The second is that knowledge of certain facts is a central element of the crime, and the court's instruction defining knowledge was erroneous and was not harmless error.

Before I embark upon a detailed analysis of the statute and the facts, a summary of the reasons why the evidence is insufficient to sustain the conviction on this charge may be helpful. It is not a crime under section 2232(c) to notify someone that you suspect that your telephone or his telephone is being tapped or that he might be intercepted on someone else's telephone tap. In order for there to be a violation of section 2232(c), a person must have knowledge of an authorization or application for an authorization to intercept a wire communication and then give notice or attempt to give notice to someone to impede *such interception*. Judge Aguilar was charged with giving notice of an application for an authorization to intercept a wire communication. In order for the statute to apply, the interception allegedly impeded had to be one authorized as a result of that application—otherwise it could not qualify as "such interception." Thus, Judge Aguilar's viewing on February 6, 1988 of an FBI agent's surveillance of Chapman entering and leaving Judge Aguilar's house and his subsequent warning that phones might be tapped, could not constitute a violation of the statute. It is only if the notification can be tied to Judge Peckham's conversation, six months before, that the statute conceivably could be violated.

In her discussion of section 2232(c), Judge Hall completely omits the statute's specific reference to "such interception." See Judge Hall's opinion at 614. Judge Hall states that "[t]he statute imposes liability on any one 'having knowledge that a Federal investigative or law enforcement officer *has been authorized or has applied* for authorization' to conduct a wiretap." *Id.* However, the statute must be read in its entirety; the statute imposes liability on anyone "having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization . . . *in order to obstruct, impede or prevent such interception.*" See 18 U.S.C. § 2232(c) (emphasis added).

Judge Peckham's purpose in mentioning the wiretap to Judge Aguilar was simply to let Judge Aguilar know that it might not be wise for Judge Aguilar to be associating with Chapman because of an appearance of impropriety. He stated that Chapman's name had come up in connection with an application for a wiretap authorization and that he had, as an Assistant United States Attorney, prosecuted Chapman many years earlier on a criminal charge. The application that Judge Peckham referred to was an application to tap the telephone of Rudy Tham. This application resulted in an authorization to tap Tham's telephone from April 20, 1987 to May 20, 1987. The authorization, resulting from the application, had long since expired by the time Judge Peckham spoke to Judge Aguilar. Even assuming that the information Judge Peckham conveyed to Judge Aguilar was sufficient to give Judge Aguilar knowledge that Chapman was an authorized interceptee, there was no way in which the interception authorized as a result of that application could have been impeded by any notification to Chapman. The authorization had expired. It is all the more clear that eight months thereafter any

notification to Chapman could not have violated the statute.

It is only if the statute could be stretched to mean that once an application for authorization to wiretap was filed, notification at any time thereafter would be a violation, that Judge Aguilar's conviction could be upheld. This is a misconstruction of the statute. An application ends with the granting or the denying of an authorization. If the authorization is denied, there can be no interception resulting. If the authorization is granted, the authorization terminates in 30 days. Any new authorization or extension requires a new application. See 18 U.S.C. § 2518(5) (1988).

The Government and the opinions of Judge Hall and Judge O'Scannlain seek to avoid this problem by focusing on whether Judge Aguilar knew on February 6, 1988 that there was a wiretap on Chapman's telephone. This would have entailed a new application and authorization. Whether Judge Aguilar "knew" or merely "suspected" that there was a new application and authorization presents a serious factual issue for the jury. The erroneous instruction equating "high probability" with "knowledge" could not be a harmless error. There is a critical distinction between the two concepts.

B. *Insufficiency of the Evidence*

With this general introduction, I will explain in more detail why the evidence is insufficient to convict under section 2232(c). Judge Aguilar was convicted of Count Six, which charged the following:

On or about February 6, 1988, in the Northern District of California, defendant, Robert P. Aguilar while a United States District Judge, having knowledge that a Federal investigative officer had applied to the United States District Court for the

Northern District of California for authorization to intercept wire communications of Abe Chapman, and in order to obstruct, impede, and prevent such interception, gave notice and attempted to give notice of the possible interception to Abe Chapman. In violation of Title 18, United States Code, Section 2232(c).

Judge Aguilar argues that there was insufficient evidence to convict him of this count. I agree.

Section 2232(c) provides in part:

Notice of Certain Electronic Surveillance.—Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent *such interception*, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2232(c) (emphasis added).

This language requires a pending application for authorization or an authorization that has not expired. The Government argues that, under section 2232(c), it is sufficient if, at some time in the past, there was a wiretap application; it does not matter, under the Government's theory, if the wiretap application has already been denied or if authorization has been granted but has already expired. This is not a reasonable construction of the statute.

The plain language of the statute makes it clear that the purpose of the statute is to prevent interference with "possible interception." It is possible that disclosure of an existing wiretap can lead to interference with interception. It also is possible that disclosure of a pending wiretap ap-

plication, if the application is subsequently authorized, can lead to interference with interception. However, disclosure of an application that already has been denied, or whose authorization already has expired, cannot possibly interfere with "such interception." The language, "such interception," shows that the statute pertains to the particular application or authorization of which the defendant has knowledge. The defendant must intend to impede an interception from the specific application or authorization of which he has knowledge.

The statute's requirement of knowledge of *either* wiretap applications *or* wiretap authorizations further demonstrates that the statute applies only to *pending* applications and *unexpired* authorizations. If Congress was concerned with the disclosure of wiretap applications even when the applications were no longer pending, it would have been unnecessary to include any language about authorizations; there is never an authorization without an application. There is no indication in the statute that Congress was concerned with *expired* authorizations, regardless of whether they are the subject of secrecy orders.

Section 2232(c), read with the language essential to this charge, is as follows:

Whoever having knowledge that a Federal . . . officer . . . has applied for . . . authorization . . . to intercept a wire . . . communication in order to obstruct . . . *such interception* gives notice or attempts to give notice of the possible interception to any person shall be fined . . . or imprisoned. . . .

(Emphasis added.)

I conclude that the statutory language is quite clearly directed to disclosure of a wiretap that could possibly result from the application of which the defendant has

knowledge—not from some later application, which would require a completely new justification under 18 U.S.C. § 2518(5) (1988). At the very least, this is a reasonable construction of the statute. Judge Hall's opinion arrives at a different construction and rejects this construction. See Judge Hall's opinion at 615. In my opinion, Judge Hall's construction is an unwarranted expansion of the statutory language, and one which ignores the crucial phrase "such interception." However, even if Judge Hall's interpretation were possible because of some ambiguity, the more lenient construction is required. To reject a reasonable construction of a statute is incompatible with the rule of lenity. "In interpreting the substantive ambit of criminal prohibitions, ambiguities must be resolved in favor of the criminal defendant." *United States v. Baxley*, 982 F.2d 1265, 1270 (9th Cir. 1992); see *United States v. Batchelder*, 442 U.S. 114, 121, 99 S.Ct. 2198, 2202, 60 L.Ed.2d 755 (1979); *Simpson v. United States*, 435 U.S. 6, 14, 98 S.Ct. 909, 913, 55 L.Ed.2d 70 (1978). I find the plain language of the statute to be clear, but even if it were possible to wring Judge Hall's construction out of some ambiguity in the statute, it would violate the rule of lenity to do so.

Furthermore, there is no indication that "the statute's primary concern is with the giving of notice with specific intent to interfere with surveillance" in general, as Judge Hall contends. See Judge Hall's opinion at 615. The statute does not impose liability on a defendant who interferes with "any future surveillance" or "any future wiretap." Rather, it imposes liability on a defendant who has knowledge of a particular wiretap application or authorization and who gives another person notice of "the possible interception" in an effort to obstruct "such interception." See 18 U.S.C. § 2232(c). Judge Hall's expan-

sive interpretation ignores the plain language of the statute.

First Amendment concerns also convince me that section 2232(c) cannot be construed to punish disclosure of all applications regardless of whether the applications are still pending. Statutes must be construed, if at all possible, to avoid constitutional problems. See *Blitz v. Donovan*, 740 F.2d 1241, 1244 (D.C.Cir.1984). The Government may regulate speech in order to promote a compelling state interest if it employs the least restrictive means to further that interest. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989). The Government does not have a compelling interest in prohibiting the disclosure of *all* wiretap applications because in many cases there is no danger of interference with a wiretap. The statute, as the Government interprets it, would punish constitutionally protected speech as well as constitutionally unprotected speech. The statute would therefore be overbroad and void on its face. See *Clark v. City of Los Angeles*, 650 F.2d 1033, 1039 (9th Cir.1981) ("overbreadth doctrine holds that a law is void on its face if it sweeps within its ambit not solely activity that is subject to governmental control, but also includes within its prohibition the practice of a protected constitutional right"), *cert denied*, 456 U.S. 927, 102 S.Ct. 1974, 72 L.Ed.2d 443 (1982). Thus, to avoid this constitutional problem, we must construe the statute to prohibit the disclosure of *pending* applications and *unexpired* authorizations only.

The Government admits that the statute is "explicitly directed at those who disclose the existence of the wiretap in order to impede interceptions." Nevertheless, the Government argues that the existence of a wiretap or pending application is unnecessary because the statute

criminalizes attempts. Thus, the Government maintains, an attempted notification is sufficient for a conviction even if the defendant erroneously believes that there is a pending wiretap application or authorization, whereas in actuality no such application or authorization exists.

Section 2232(c) is not a classic attempt statute. The classic attempt statute criminalizes an attempt to violate *another* statute or *another* statutory subsection. *See, e.g.*, 18 U.S.C. § 1113 (1988) (criminalizing an attempt to commit murder or manslaughter; murder criminalized by 18 U.S.C. § 1111 (1988) and manslaughter criminalized by 18 U.S.C. § 1112 (1988)); 18 U.S.C. § 1201(d) (1988) (criminalizing an attempt to violate 18 U.S.C. § 1201(a)(4) (1988), which prohibits the kidnapping of foreign officials). There is not a statute that criminalizes attempts to violate section 2232(c), and section 2232(c) does not criminalize an attempt to violate another statute or statutory subsection.

Section 2232(c) itself punishes someone who "gives notice *or attempts* to give notice" of possible interception. (Emphasis added.) Therefore, we must examine the language of section 2232(c) to discover whether an erroneous belief that there is a wiretap application is sufficient for conviction. A reading of the statute demonstrates that the word "attempt" modifies only the words "to give notice." There is no modification of the language that requires "*knowledge* that a Federal investigative or law enforcement officer has been authorized or has applied for authorization" to tap someone. (Emphasis added.) Therefore, regardless of whether the defendant notifies or attempts to notify someone of possible interception, the

defendant must have knowledge of the pending wiretap application or authorization.³

The only application about which Judge Aguilar arguably could have had any knowledge was the application mentioned by Judge Peckham. This application had resulted in the authorization to tap Rudy Tham's telephone and had expired by the time Judge Peckham spoke to Judge Aguilar. Therefore, there was no possibility that Judge Aguilar by any notification could have impeded an interception authorized as a result of that application.

C. Knowledge Instruction

[8] Even if we accept the Government's view that the knowledge required is that there was in the past an application, and that after observing the FBI's surveillance, Judge Aguilar put "two-and-two together" and therefore "knew" that wires were being tapped, and that Chapman was designated as an authorized interceptee, the erroneous knowledge instruction requires reversal.

The district court gave the following instruction defining knowledge:

Knowledge of a fact, members of the jury, means that you're satisfied from the evidence that he knew it[.]

³ Section 472 of Title 18 provides a fitting analogy. Section 472 punishes a person who "passes, utters, publishes, or sells, or *attempts* to pass, utter, publish, or sell" counterfeited obligations or securities. 18 U.S.C. § 472 (1988) (emphasis added). To be convicted of passing counterfeit money, the defendant must know that the money is counterfeit. *United States v. Palacios*, 835 F.2d 230, 232 (9th Cir. 1987). In addition, to be convicted of *attempting* to pass a counterfeit bill, the defendant must know that the bill is counterfeit. *See United States v. Lacey*, 459 F.2d 86, 88-89 (2d Cir. 1972). Thus, the attempt language in section 472 does not eliminate the knowledge element of the crime.

Or knowledge of the existence of a particular circumstance may be satisfied by proof that the defendant *was aware of a high probability of the existence of that circumstance[.] unless you find from the evidence that the defendant actually believed that the circumstance did not exist.*

(Emphasis added.)

This instruction was erroneous. There is clearly a difference between knowledge and an awareness of a high probability that a circumstance exists. A person knows of a circumstance if he or she is aware of that circumstance.

The Model Jury Instruction for the Ninth Circuit instructs that "[a]n act is done knowingly if the defendant is *aware* of the act and does not act [or fail to act] through ignorance, mistake, or accident." Model Jury Instruction 5.06 (1992) (emphasis added).⁴ If awareness is knowledge, when a person is aware of a high probability that a circumstance exists, then what the person "knows" is that there is *a high probability* that the circumstance exists. Knowledge that there is a high probability that a circumstance exists cannot be equated, however, with knowledge that the circumstance itself exists. Furthermore, one can be aware of a high probability that something exists and actually believe that it exists, yet this is far short of knowing it exists. One cannot know something that does not exist. Yet, one can be aware of a high probability that a circumstance exists, and even believe that it exists, despite the fact it does not exist.

The knowledge instruction at issue in the instant case was based on Model Penal Code § 2.02(7) which states:

Requirement of Knowledge Satisfied by Knowledge of High Probability. When knowledge of the exist-

⁴ This definition comports with the definition of knowledge contained in Model Penal Code § 2.02(2)(b), which is discussed below.

ence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

Both the Government and Judge Hall contend that this is an accurate definition of knowledge. I disagree.

According to the Model Penal Code, a person generally "is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." Model Penal Code § 2.02(1). Comment 9 to section 2.02(7) makes it clear that section 2.02(7) is only to be used to fulfill the "knowingly" requirement when willful ignorance is an issue. Comment 9 states:

Subsection (7) deals with the situation that British commentators have denominated "willful blindness" or "connivance," the case of the actor who is aware of the probable existence of a material fact but does not determine whether it exists or does not exist.

Model Penal Code § 2.02(2)(b) further demonstrates that section 2.02(7) is not a "comprehensive definition" of knowledge, as Judge Hall contends it is. See Judge Hall's opinion at 619. Section 2.02(2) is entitled "Kinds of Culpability Defined." Each crime described in the Model Penal Code requires a specific kind of culpability. Section 2.02(2)(b) defines the culpable state of "knowingly" and includes the definition for knowledge of a circumstance. It provides in relevant part:

A person acts knowingly with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or the *attendant circumstances*, he is *aware* that his

conduct is of that nature or that such circumstances exist. . . .

Model Penal Code § 2.02(2)(b) (emphasis added). If section 2.02(7) were a comprehensive definition of knowledge, as Judge Hall maintains it is, there would be no need for section 2.02(2)(b) which is, in fact, the Model Penal Code's general definition of knowledge.

I am convinced that Model Penal Code § 2.02(7) is relevant only when there is evidence of willful blindness. In *United States v. Jewell*, 532 F.2d 697 (9th Cir.) (en banc), cert. denied, 426 U.S. 951, 96 S.Ct. 3173, 49 L.Ed.2d 1188 (1976), this court considered a case in which the defendant purposely avoided learning whether there was marijuana in the car he was driving from Tijuana, Mexico, to California. In finding that the defendant "knew" of the marijuana, this court recognized that "'knowingly' includes a mental state in which the defendant is aware that the fact in question is highly probable *but consciously avoids enlightenment*. . . ." *Id.* at 704 (emphasis added). If, as Judge Hall and the Government contend, an awareness that a fact is highly probable constitutes knowledge, then the italicized part of the quoted sentence would be superfluous.

The *Jewell* court went out of its way to make it clear that an awareness of a high probability that a circumstance exists is sufficient to fulfill a requirement of knowledge only when the defendant consciously chooses to avoid obtaining positive knowledge. "It is worth emphasizing," we stated, "that the required state of mind differs from positive knowledge *only so far as necessary to encompass a calculated effort to avoid the sanctions of the statute while violating its substance*." *Id.* (emphasis added) (footnote omitted). Thus, the *Jewell* court concluded that deliberate ignorance was sufficient to fulfill the knowledge

requirement not because deliberate ignorance is the equivalent of knowledge, but because deliberate ignorance is just as culpable as knowledge. *Id.* at 700.

I can find no decisions by this court or by the Supreme Court that employ section 2.02(7) as a general definition of knowledge. Both the Government and Judge Hall rely on a footnote in *Leary v. United States*, 395 U.S. 6, 46 n. 93, 89 S.Ct. 1532, 1553 n. 93, 23 L.Ed.2d 57 (1969), for the proposition that section 2.02(7) is a general definition of knowledge. Their reliance on *Leary* is misplaced. The *Leary* Court did not purport to adopt section 2.02(7) as a general definition of knowledge. Examination of the footnote reveals that the Court adopted section 2.02(7) only for the purposes of 21 U.S.C. § 176a. The entire footnote states:

Nothing in the legislative history of § 176a is of aid in determining the intended scope of the word "knowing," as it is used in *that section*. In making *that determination*, we have employed as a general guide the definition of "knowledge" which appears in the Proposed Official Draft of the Model Penal Code, at 27 (1962). The Code provides:

"When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."

Leary, 395 U.S. at 46 n. 93, 89 S.Ct. at 1553 n. 93 (emphasis added).

Leary differs in several important ways from the instant case. In *Leary*, the defendant was convicted of smuggling marijuana into the United States in violation of 21 U.S.C. § 176a. Drug smuggling is the classic case in which deliberate ignorance is a concern. See *Jewell*, 532 F.2d at 703

(noting the large number of drug smuggling cases involving conscious avoidance). There is no reason to believe that people who reveal wiretaps or wiretap applications often consciously avoid knowledge of the wiretaps or wiretap applications. Certainly, there is no evidence that Judge Aguilar tried to avoid learning about the wiretaps here.

Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970), reinforces the conclusion that section 2.02(7) applies only to cases in which deliberate ignorance is a concern. In *Turner*, the statute at issue, 21 U.S.C. § 174, was virtually identical to the statute at issue in *Leary*, 21 U.S.C. § 176a. Section 176a was concerned with marijuana smuggling, and section 174 was concerned with narcotics smuggling. The Court concluded, “‘Common sense’ (*Leary v. United States*, *supra*, 395 U.S. at 46, 89 S.Ct. at 1553) tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled.” *Id.* 396 U.S. at 417, 90 S.Ct. at 653 (citation in original) (footnote omitted).

With respect to the statutes involved in both *Turner* and *Leary*, there was an obvious congressional intent for juries to infer knowledge. Both section 176a⁵ and section 174⁶ explicitly permitted juries to infer or presume knowl-

⁵ Section 176a provided in part:

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

21 U.S.C. § 176a.

⁶ Section 174 provided in part:

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug,

edge. Nothing on the face of section 2232(c) indicates a congressional intent to allow juries to infer or presume knowledge.

Moreover, contrary to the Government's contentions, the legislative history of section 2232(c) does not indicate a congressional intent to adopt Model Penal Code § 2.02(7) as a general definition of knowledge. On June 19, 1986, the House Judiciary Committee reported the House bill as H.R. 4952. The report accompanying that bill included a footnote concerning the knowledge requirement for conviction of disclosing a wiretap. See H.R.Rep. No. 647, 99th Cong., 2d Sess. 60, n. 91 (1986). The footnote simply refers to H.R.Rep. No. 1396, 96th Cong., 2d Sess. 32-36 (1980), which accompanied the Criminal Code Revision Act of 1980. The Senate Judiciary Committee issued a report to accompany its own bill, S. 2575. This Senate Report explains that to convict under section 2232(c), “[i]t is required that the defendant have knowledge that the Federal law enforcement or investigative officer has been authorized or has applied for an interception order.” S.Rep. No. 541, 99th Cong., 2d Sess. 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3588. The report makes no attempt to define knowledge, and the footnote present in the House Report is not contained in the Senate Report. The House eventually substituted the Senate bill for its own, and Congress enacted the Senate bill into law. Therefore, any definitions of knowledge contained in the House Report would be of dubious value in determining Congress's intended definition of knowledge.

such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

21 U.S.C. § 174.

Even if we were to accept the footnoted reference to H.R.Rep. No. 647 as evidence of congressional intent, it is clear from the report that Congress did not intend to adopt Model Penal Code § 2.02(7) as a general definition of knowledge. The footnote cites pages 32-36 of H.R.Rep. No. 1396. On page 33, the report defines a knowing state of mind as "an awareness of or a firm belief in the existence of the circumstance."

The only reference in H.R.Rep. No. 1396 to section 2.02(7) is in the discussion of willful blindness. The Report states:

The Model Penal Code language [in Section 2.02(7)], in the words of its drafters, "deals with the situation British commentators have denominated 'wilful blindness' or 'connivance,' the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist." Model Penal Code section 2.02, Comment at 129-30 (Tent. Draft No. 4, 1955). The Committee intends to incorporate this Model Penal Code concept as that concept has been explained in such Federal cases as *United States v. Jewell*, 532 F.2d 697 (9th Cir.), cert. denied, 426 U.S. 951, 96 S.Ct. 3173, 49 L.Ed.2d 1188 (1976); and *United States v. Jacobs*, 475 F.2d 270 (2d Cir.), cert. denied, sub nom. *Thaler v. United States*, 414 U.S. 821, 94 S.Ct. 131, 38 L.Ed.2d 53 (1973).

Id. at 35-36. Both *Jewell* and *Jacobs* discuss the language of section 2.02(7) in the context of willful blindness. See *Jewell*, 532 F.2d at 700-01; *Jacobs*, 475 F.2d at 287-88.

The Government's reliance on *United States v. Yermian*, 708 F.2d 365 (9th Cir. 1983), rev'd on other grounds, 468 U.S. 63, 104 S.Ct. 2936, 82 L.Ed.2d 53 (1984), is also misplaced. In *Yermian*, the defendant was convicted of making a false statement in a matter within

the jurisdiction of a federal agency, in violation of 18 U.S.C. § 1001 (1976). *Id.* at 365-66. The issue in *Yermian* was whether an objective *mens rea* was sufficient for conviction. The court was not concerned with setting forth a general definition of knowledge. The district court instructed the jury that it could convict the defendant if it found "that the defendant knew or should have known that the information was to be submitted to the government." *Id.* at 371 (emphasis in original). In *Yermian*, we were concerned that the "should have known" language imposed an objective standard, and we concluded that a subjective state of mind was necessary. See *id.* at 372.

The instruction in the case at bar differs significantly from the instruction in *Yermian*. Here, we are not concerned that the instruction imposed an objective standard; we are concerned that it imposed the *wrong* subjective standard. An awareness of a high probability that a circumstance exists is no doubt a subjective state of mind. Nevertheless, it is a subjective state of mind that differs substantially from the subjective state of mind that is knowledge.

The Due Process Clause places the burden on the Government to prove knowledge beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). The instruction relieved the Government of this burden of proof by requiring the jury to infer knowledge from the defendant's awareness of a high probability that a circumstance existed. The instruction was therefore improper.

The instruction's balancing clause, which states, "unless you find from the evidence that the defendant actually believed that the circumstance did not exist," does not remedy the flawed instruction. This clause merely made the conclusive inference rebuttable. The burden of rebuttal was placed on the defendant. Under *Sandstrom v.*

Montana, 442 U.S. 510, 521, 99 S.Ct. 2450, 2458, 61 L.Ed.2d 39 (1979), this burden shifting is constitutional error. See *United States v. Hogg*, 670 F.2d 1358, 1363-64 (4th Cir.1982) (instructing jury to infer knowledge from delit rate avoidance unless defendant believed circumstance did not exist was constitutional error). The instruction allowed the jury to convict Judge Aguilar even if he was uncertain about whether there was a wiretap application or authorization. See *United States v. North*, 910 F.2d 843, 886 (D.C.Cir.) (requirement that defendant prove he lacked a belief reverses the burden of proof; knowledge does not mean lack of knowledge), *superseded on other grounds*, 920 F.2d 940 (1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991).

D. Harmless Error

The erroneous knowledge instruction could not be harmless beyond a reasonable doubt. First, Judge Peckham indicated only that Chapman's name had come up in connection with an application. He did not indicate that Chapman's phone was to be tapped or that Chapman was to be a person whose calls would be intercepted. In providing the information required in an application for a wiretap under 18 U.S.C. § 2518(1) (1988), many persons' names "could come up" in explaining the nature of the investigation without those persons being designated as proposed interceptees. Thus, a question of fact exists as to whether Judge Aguilar "knew" from Judge Peckham's statements that Chapman's calls would be intercepted. This is particularly a fact to be resolved when it is recalled that Judge Peckham was simply trying to advise Judge Aguilar that it might be unwise for him to be seen associating with Chapman, and not to relate to him whose messages were to be intercepted by the wiretap.

Secondly, it is important to note that there has been a subtle shift in the Government's position on what it contends Judge Aguilar had to know. The Government contends it is enough to establish that Judge Aguilar knew there was once an application for a wiretap, in which Chapman's name came up, and that "putting two-and-two together" he then knew eight months thereafter that there was a wiretap that could intercept Chapman's messages. Even if we accept this proposition, there is a serious factual question as to what Judge Aguilar could have known and what he merely suspected.

If Judge Aguilar had been completely and fully informed of the application about which Judge Peckham spoke, he would have known that there was an application to tap Tham's telephone and that Chapman's messages were designated to be intercepted. Further, he would have known that the authorization was granted on April 20, 1987, and terminated on May 20, 1987. In order for Judge Aguilar to have known that Chapman's messages could be intercepted on February 6, 1988, over eight months after the authorization terminated, he would have had to have known that a new application had been made, with all of the detailed specific requirements of 18 U.S.C. § 2518(1) having been fulfilled and the authorization having been granted by the court. Even an extension of a prior authorization requires a new application complying with section 2518(1). Furthermore, the Tham application mentioned by Judge Peckham was based on a national labor racketeering investigation, an investigation entirely different from the investigation resulting in the later wiretaps. It is very difficult to see how Judge Aguilar possibly could have "known" of these wiretaps as opposed to having had a mere suspicion, based on the then-current surveillance of Chapman and himself. Even if this were

the knowledge required, there was a serious question of fact that the jury was required to resolve under the erroneous instruction. It could not have been harmless error.

The Government argues, and Judge Hall agrees, that any error in the knowledge instruction is harmless beyond a reasonable doubt because Judge Aguilar stated in a taped conversation three months after the time of the alleged offense that he “knew” they were wiretapping Chapman. See Judge Hall’s opinion at 620. We are all familiar with the colloquial expression that we “know” something when we only expect it to be true: “I know it will rain,” “I know someone will be elected,” “I know the road will be clear.” The jury had to evaluate more than this expression; it had to consider what Judge Aguilar actually could have known. He knew that Judge Peckham had stated that Chapman’s name had come up in connection with a wiretap application eight months before, and he knew that there was a person, who he believed to be an FBI agent, that appeared to be conducting a surveillance of Chapman. These facts most certainly present a jury question of whether on February 6, 1988 Judge Aguilar really “knew” Chapman’s communications were being tapped. The instruction requiring that the jury find only a high probability that he knew as opposed to requiring actual awareness of the fact, would play a crucial part in guiding the jury’s determination of the knowledge element of the crime. It could not be harmless beyond a reasonable doubt.

Furthermore, the recent decision of the Supreme Court in *Sullivan v. Louisiana*, ___ U.S. ___, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), indicates that an erroneous instruction on an essential element of the crime can never be harmless because it deprives a defendant of his Sixth Amendment right to have the jury determine that issue of fact. The *Sullivan* Court held that an erroneous instruction defining reasonable doubt cannot be harmless

because the defendant has a Sixth Amendment right to have the jury determine his guilt. *Id.* at ___, 113 S.Ct. at 2081-83. It does not fulfill Sixth Amendment requirements to have judges hypothesize that a guilty verdict would have been rendered no matter how overwhelming the evidence of guilt might be. *Id.* at 2081-83.

Justice Scalia’s opinion in *Sullivan* states:

Harmless-error review looks, we have said, to the basis on which “the jury *actually rested* its verdict.” *Yates v. Evatt*, 500 U.S. ___, ___, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Id.

This principle is equally applicable to a finding of an essential element of a crime—in this case, knowledge. In order to render a verdict of guilty, a jury must find all of the essential elements of the crime, under proper instruction. “[A] jury’s verdict [of guilty] cannot stand if the instructions provided the jury do not require it to find *each element* of the crime under a proper standard of proof.” *Cabana v. Bullock*, 474 U.S. 376, 384, 106 S.Ct. 689, 696, 88 L.Ed.2d 704 (1986) (emphasis added) (citing *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)). Here, the jury did not make a finding of knowledge under a proper instruction. For appellate court judges to make this finding, by concluding what the jury *would have found* under a proper instruction, violates the defendant’s

Sixth Amendment right to have a jury actually make that finding. It is a structural error of constitutional dimension—the judges, instead of the jury, are making the finding essential to the verdict. See *Sullivan*, ____ U.S. at ____, 113 S.Ct. at 2082-83.

Justice Scalia vividly makes this point in his earlier concurring opinion in *Carella v. California*, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989).

The constitutional right to a jury trial embodies “a profound judgment about the way in which law should be enforced and justice administered.” It is a structural guarantee that “reflect[s] a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.” A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State.

.....
In other words, “the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials.”

... And the problem would not be cured by an appellate court’s determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not by a jury. As with a directed verdict, “the error in such a case is that the wrong entity judged the defendant guilty.”

Id. at 268-69, 109 S.Ct. at 2422 (internal citations omitted).

I shall summarize my position:

Judge Aguilar was charged with having knowledge of an *application* to intercept wire communications and attempting to impede *such* communications. It is not a violation of section 2232(c) to have knowledge of one application but seek to impede the communications sought to be intercepted by another application.

It is clear that Judge Aguilar could not have impeded any interception of communications sought by the application resulting in the April 20, 1987 authorization. The life of that application had long since ended. Judge Hall and Judge O’Scannlain have adopted the Government’s position and focused on Judge Aguilar’s knowledge of a new wiretap on Chapman’s telephone in effect on February 6, 1988. They conclude that by putting two and two together (the knowledge of the earlier application to tap Tham’s telephone and the FBI surveillance on the street) that Judge Aguilar “knew” Chapman’s telephone was being tapped. See Judge Hall’s opinion at 617. Thus, they conclude that this “putting two and two together” is equivalent to actual knowledge and, even more importantly, that this was the only decision the jurors could have reached, even if they were properly instructed on the issue.

Following the logic of that approach, it would have to be proved beyond a reasonable doubt that Judge Aguilar knew that a new and different application had been made to tap Chapman’s telephone and that Judge Aguilar sought to impede the interception of communications sought in that application. The earlier application was to tap Tham’s telephone in an entirely different investigation. It is very difficult for me to see how a jury, even under a proper instruction, could have found that Judge Aguilar “knew” of some new application that authorized the tapping of Chapman’s telephone in February of 1988. No

doubt he suspected it was true. I can see how a jury under a "high probability" instruction could have determined that Judge Aguilar's strong suspicions constituted enough proof that the requisite knowledge existed. However, there was, at the very least, a serious factual question concerning his knowledge that had to be determined under a correct instruction on the law. The instructional error could not be harmless beyond a reasonable doubt.

III. OBSTRUCTION OF JUSTICE CHARGE

A. Summary of Reasons for Reversal

There are also two reasons for reversing the obstruction of justice charge. The first is that 18 U.S.C. § 1503, under which Judge Aguilar was charged, does not apply to the facts of this case. The second is that even if section 1503 did apply to the facts of this case, the erroneous knowledge instruction, previously discussed in Section II. C., would require reversal. Knowledge of certain facts are essential elements of the crime, and the erroneous knowledge instruction seriously misinformed the jury about determining these elements of the crime.

B. The Statute Does Not Apply

The conviction on this charge requires reversal because the interpretation of section 1503 cannot be stretched to reach the facts of this case. The facts are that Judge Aguilar, as a target of the investigation, gave misinformation to the FBI, minimizing his involvement with Chapman and attorney Solomon. At most, this is a false statement to the FBI that interferes with its investigation. This type of offense would have to be proved under 18 U.S.C. § 1001 (1988), which concerns false statements to federal agencies. Judge Aguilar was not charged with a violation

of section 1001. Furthermore, even under a section 1001 charge, the statute does not apply to certain situations where a truthful response would have incriminated the declarant. This is known as the "exculpatory no" doctrine. We explained the application of section 1001 and the "exculpatory no" doctrine in *United States v. Equihua-Juarez*, 851 F.2d 1222, 1224 (9th Cir. 1988).

In the case before us, Judge Aguilar is charged with obstructing justice under section 1503. This requires the obstruction of a judicial proceeding, not simply an FBI investigation. The judicial proceeding he is charged with obstructing is a grand jury investigation of a conspiracy involving himself and others. Judge Aguilar did not coerce, intimidate, or attempt to persuade the FBI agents to testify falsely before the grand jury. He simply misinformed the FBI about the extent of his contacts with Chapman and Solomon. This is not admirable, but it does not constitute the crime of obstructing justice under section 1503.

As I state in the next section, there is a serious question as to whether Judge Aguilar had the requisite knowledge that a grand jury was investigating this matter and that these FBI agents were expected to be witnesses. Even assuming he had the requisite knowledge, he did not violate this statute simply by misinforming the FBI of his contacts with Chapman and Solomon. To construe the statute as the Government has in this case would mean that anyone who makes a false statement to any person who is expected to be a witness before a grand jury or any other judicial proceeding about a subject under investigation could be guilty of the crime of obstructing justice. Other statutory sections safeguard against misinformation to a grand jury. False testimony before a grand jury is punishable as perjury. Causing a witness knowingly to testify

falsely is suborning perjury. This obstruction of justice statute was simply not intended to extend to the facts of this case. I know of no other reported case where such a charge has been held to be proper, and none has been cited by the Government.⁷

Judge Aguilar was convicted of Count Eight, which stated:

1. At all times relevant to this count of the indictment, defendant AGUILAR was aware that a federal grand jury in the Northern District of California was investigating possible violations of federal criminal law by ROBERT P. AGUILAR, Abe Chapman, Michael Rudy Tham, and others.

2. On or about June 22, 1988, defendant ROBERT P. AGUILAR, while a United States District Judge, did corruptly endeavor to influence, obstruct, and impede the aforementioned grand jury investigation, and thus the due administration of justice in the Northern District of California, by mak-

⁷ The Tenth Circuit was recently faced with a case in which a defendant had been charged with violating 18 U.S.C. § 1001 and § 1503 for making false statements to FBI agents who were investigating on behalf of a sitting grand jury. The district court had dismissed the obstruction of justice charge for failure to adequately state a crime under 18 U.S.C. § 1503. *United States v. Wood*, 958 F.2d 963, 964-65 (10th Cir.), *amended on other grounds*, 1992 WL 58305 (March 19, 1992).

The specific issue of whether this was a proper charge under section 1503 was not raised in the appeal. The court expressed no opinion on whether the conduct charged was proscribed by section 1503. However, the court expressed some skepticism that it was, noting that obstruction of justice could be committed in a variety of ways but that "we have not found one reported case where a person was charged with, much less convicted of, obstructing justice based on unsworn false statements to FBI agents investigating on behalf of a grand jury." *Id.* at 974-75 and n. 19.

ing false and misleading statements to Special Agents of the Federal Bureau of Investigation concerning defendant AGUILAR's assistance to Michael Rudy Tham and concerning defendant AGUILAR's knowledge and disclosure of information concerning court-ordered electronic surveillance of Abe Chapman.

In violation of Title 18, United States Code, Section 1503.

A brief history of section 1503 is enlightening as to Congress's intended application of the statute. Briefly stated, section 1503, as it was originally enacted in 1948, specifically proscribed certain conduct seeking to influence witnesses in judicial proceedings. The title of the section, as well as the body, indicated that the statute was intended to cover judicial officers, jurors, and witnesses. The full text of the statute is set forth in the margin.⁸ In 1982, Congress

*** § 1503. INFLUENCING OR INJURING OFFICER, JUROR OR WITNESS GENERALLY**

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

enacted the Victim and Witness Protection Act, 96 Stat. 1248 (1982). This new statute removed all references to witnesses in section 1503 and enacted a new section, section 1512, addressed specifically to the influencing of witnesses, victims, and informants. The Second Circuit in *United States v. Hernandez*, 730 F.2d 895, 899 (2d Cir. 1984), stated in its conclusion that section 1512 replaced that part of section 1503 that pertained to witnesses. The *Hernandez* case involved a threat to kill a witness, and the court held that the charge could not be sustained under section 1503. *Id.*

Our court faced a charge of witness tampering under somewhat different circumstances in *United States v. Lester*, 749 F.2d 1288 (9th Cir. 1984). The facts in the *Lester* case involved the hiding and bribing of a witness in order to prevent him from testifying in a criminal trial. We disagreed with the broad statement of the Second Circuit in the *Hernandez* case that "congress affirmatively intended to remove witnesses entirely from the scope of § 1503." *Id.* at 1295. We distinguished *Hernandez*, noting that it dealt with intimidation and harassment of a witness, whereas *Lester* involved non-coercive witness tampering. We observed that section 1512 did not encompass such non-coercive conduct and, thus, concluded that this conduct still remained punishable under the omnibus clause of section 1503. *Id.* at 1295-96.

In 1986, the Second Circuit dispelled any doubts about what was meant by the *Hernandez* opinion, stating that section 1512 was intended to completely supplant the portion of section 1503 that dealt with witnesses. *United States v. Jackson*, 805 F.2d 457, 461 (2d Cir. 1986), cert. denied, 480 U.S. 922, 107 S.Ct. 1384, 94 L.Ed.2d 698 (1987). This presented a clear conflict with our *Lester* case.

In 1988, Congress obviated this conflict between the Ninth and Second Circuits by amending section 1512 to

cover specifically non-coercive witness tampering. This eliminated the problem that we discussed in *Lester*.⁹ Section 1512, as it read at the time of our decision in *Lester*, was limited to witness tampering by a person who accomplished it or attempted to accomplish it through intimidation, physical force, threats or misleading conduct. This left non-coercive witness tampering untouched unless it could be classified as "misleading conduct." The 1988 amendment to section 1512 inserted the phrase "or corruptly persuades" within the proscribed conduct, thus providing for non-coercive witness tampering. The pertinent part of section 1512 as amended is as follows:

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

...
shall be fined not more than \$250,000 or imprisoned not more than ten years, or both.

This amendment was adopted November 18, 1988, approximately five months after the conduct forming the basis for the charge against Judge Aguilar occurred. Thus, in our circuit, under the authority of the *Lester* opinion, non-coercive witness tampering was still covered under the omnibus clause of section 1503.

⁹ The Second Circuit in *United States v. Masterpol*, 940 F.2d 760, 763 (2d Cir. 1991), observed that the 1988 amendments "diminished significantly" the force of the *Lester* precedent. Perhaps, more fundamentally, it could be stated that the problem we saw in *Lester* was alleviated by Congress.

The importance of the legislative history to this case is that in removing the conflict between the Ninth Circuit and the Second Circuit, Congress indicated what type of non-coercive conduct was meant to be proscribed with regard to witnesses. It is conduct that "*corruptly persuades . . . or attempts to do so*" in order to influence or prevent the testimony of any person in an official proceeding.

Section 1503 currently provides:

§ 1503. Influencing or injuring officer or juror generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, *or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice*, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1503 (emphasis added.) The italicized part of this statute is often referred to as the "omnibus clause," and it is the part of the statute that Judge Aguilar is alleged to have violated.

In order to sustain a conviction under that clause, it must be found that Judge Aguilar's actions "corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." Congress's translation of this requirement as it pertains to witnesses, by its amendment to section 1512, indicates that the conduct must involve a defendant who "corruptly persuades . . . or attempts to [persuade]" a witness so as to influence his testimony.

If a person sought to influence the testimony of a witness by bribery or extortion, this would clearly fall within the normally accepted meaning of corrupt. Simply making a false statement to a witness is a far cry from any generally accepted meaning of "corrupt influence" or "corrupt persuasion." To place in contrast the type of conduct that would be corrupt influence, in my opinion, consider the following hypothetical fact situation: FBI agents go to a judge, state that they have done an investigation, and reveal certain facts that they intend to relate to a grand jury, which indicate that the judge had engaged in a conspiracy to influence another judge. If the defendant judge appeals to them not to so testify because it would harm his career, offers them a bribe not to testify, or threatens that he will see that they lose their jobs if they testify—that would amount to an attempt to corruptly influence the FBI agents to change their testimony.

Judge Aguilar did not try to tell the FBI agents how to testify, did not try to persuade them not to testify, and did not try to dissuade them from testifying as to what their investigation otherwise revealed. He simply did not tell them the straight story as to his contacts with Chapman and Solomon. This is very different from the other types of activities enumerated in section 1503.

There is a significant difference between making a false statement to a potential witness and trying to get a witness to change his or her testimony through threats, force, bribery, extortion or other means of corrupt persuasion. If "corruptly influence" is extended to mean "making false statements to a potential witness," we will have expanded the statute far beyond its reasonable construction. If for no other reason, the rule of lenity would preclude such a construction.

An additional reason why the evidence in this case is insufficient to sustain a conviction under section 1503 is the lack of proof that the FBI was acting on behalf of the grand jury. We have interpreted section 1503 as extending only to interference with a pending judicial proceeding. *United States v. Brown*, 688 F.2d 596, 598 (9th Cir. 1982). Interference with a government agency's investigation is insufficient. *Id.* There is no evidence that a grand jury had authorized or directed the FBI investigation; nor is there evidence that the FBI agents had been subpoenaed to testify. At most, the conduct alleged was interference with an FBI investigation, not a judicial proceeding. The mere fact that the FBI investigation could result in producing evidence that might be presented to a grand jury is insufficient to constitute a violation of section 1503. In *Brown*, we held that although warning the target of a search warrant did interfere with a policy investigation, it did not constitute interference with a grand jury proceeding even though evidence derived from the search might have been presented to a grand jury. *See id.*

C. Erroneous Knowledge Instruction

Even if section 1503 applied to false statements made to FBI agents, we would have to reverse because the knowledge instruction was erroneous. The violation of section

1503 requires that the defendant know of the pending judicial proceeding and that the FBI agents were expected to be called to testify. *See United States v. Washington Water Power Co.*, 793 F.2d 1079, 1084 (9th Cir. 1985). There is a serious question of fact, given the noncommittal responses of the FBI agents, as to whether Judge Aguilar knew a grand jury had been convened and, if so, what it was investigating. Furthermore, it was not at all clear that the agents were expected to be called to testify before a grand jury.

In Section II. C., I have discussed the serious error in the knowledge instruction given by the court. Under that instruction, the jury could have convicted Judge Aguilar even if he was not actually aware of the pertinent facts, provided the jury found that there was a "high probability" that he knew. In light of the conflicting evidence, this error could not have been harmless beyond a reasonable doubt. As previously noted, the Supreme Court's recent decision in *Sullivan* indicates that an erroneous instruction on an essential element of the crime can never be harmless. *See* ____ U.S. at ____-____ 113 S.Ct. at 2081-83.

IV. CONCLUSION

In conclusion, I would reverse on both counts on the ground of insufficiency of the evidence. The statutes that Judge Aguilar allegedly violated do not extend to the facts of this case. Even if this were not the case, I would reverse and remand for a new trial on the basis that the knowledge instruction was erroneous and prevented the jury from properly deliberating on essential elements of the crimes charged. In neither case can this serious error concerning essential elements of the crime be determined to be harmless beyond a reasonable doubt.

O'SCANNLAIN, Circuit Judge, concurring in part:

I would affirm Judge Aguilar's conviction for disclosure of a wiretap under 18 U.S.C. § 2232(c) but would reverse his conviction for obstruction of justice under 18 U.S.C. § 1503. Thus, I concur in the result reached by Judge Hall as to Count Six and in the result reached by Judge Hug as to Count Eight.

As to the appeal of the sentence, we reject the government's challenge to the district court's decision to depart downward from the Sentencing Guidelines. However, the court failed to follow the procedure set forth in *United States v. Lira-Barraza*, 941 F.2d 745 (9th Cir. 1991) (en banc). Consequently, we must vacate the sentence on Count Six and remand for resentencing.

I

I agree with Judge Hall that a rational trier of fact could find beyond a reasonable doubt that Judge Aguilar had knowledge of the wiretap application; there clearly was sufficient evidence in the record. Accordingly, I concur in part II.A of her opinion. I also agree that section 2232(c) does not violate the First Amendment as applied to Judge Aguilar. Accordingly, I concur in part II.B of her opinion. I cannot agree, however, with Judge Hall's analysis of the knowledge instruction in parts II.C and II.D of her opinion. I believe that the district court's knowledge instruction was erroneous for the reasons set forth by Judge Hug in section C of his opinion; nevertheless, I conclude that the error, fatal as to Count Eight, was harmless as to Count Six.

I believe that Judge Hug's analysis of the knowledge instruction is correct. Therefore, reversal on both counts is required unless the error was logically harmless beyond any reasonable doubt because the record compels a guilty

verdict. *United States v. Sanchez-Robles*, 927 F.2d 1070, 1075 (9th Cir. 1991); see also *United States v. Alvarado*, 838 F.2d 311, 317 (9th Cir.) ("Application of the harmless error doctrine is appropriate where the evidence of guilt is so overwhelming that a conviction is compelled."), *cert. denied*, 487 U.S. 1222, 108 S.Ct. 2880, 101 L.Ed.2d 915 and 488 U.S. 838, 109 S.Ct. 103, 102 L.Ed.2d 78 (1988). Applying any other standard of review to this erroneous instruction would allow for conviction without establishment of knowledge, an essential element of the offense, beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970) (due process requires that each element of an offense be proved beyond reasonable doubt). But see *United States v. Valle-Valdez*, 554 F.2d 911, 915-16 (9th Cir. 1977) (noting some confusion in the cases, but observing that errors in jury instructions are generally considered non-constitutional and therefore the standard from *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), need not apply).

A

After examination of the record, I conclude that the error was harmless beyond a reasonable doubt with respect to Count Six, the wiretap count. The evidence of Judge Aguilar's knowledge consisted of the following:

- (1) Both Judge Peckham and Judge Aguilar testified that Judge Peckham had told Judge Aguilar that Chapman's name had come up "in connection with" a wiretap;
- (2) Judge Aguilar saw an FBI agent photographing Chapman outside Aguilar's house;
- (3) Steve Aguilar testified that Judge Aguilar told him that he had overheard at work that Chapman was being wiretapped.

- (4) Three months after Judge Aguilar revealed the wiretap to Chapman, he repeatedly told Solomon in recorded conversations that he knew Chapman's phone was tapped.

The strongest evidence against Judge Aguilar is the transcript of his May 17 conversation with Solomon. Because it post-dates Judge Aguilar's alleged violation of section 2232(c) by more than three months, I am reluctant to assign "overwhelming" weight to this evidence. See Judge Hall's Opinion, at 622. Nonetheless, the combination of what Judge Peckham told Judge Aguilar and what Judge Aguilar told Steve Aguilar shows conclusively that Judge Aguilar was substantially certain that Chapman had been or was being tapped. It does not appear that Judge Aguilar received any additional information between the disclosure and his self-incriminating statements. I therefore conclude that the erroneous instruction was harmless beyond a reasonable doubt with regard to Count Six.

B

On the other hand, I cannot conclude that the error was harmless beyond a reasonable doubt as to Count Eight, the obstruction of justice count. The obstruction count requires a showing that the defendant knew: (1) that a grand jury was meeting, and (2) that the person tampered with was expected to be called as a witness before the grand jury. *United States v. Washington Water Power Co.*, 793 F.2d 1079, 1084 (9th Cir. 1986). There appears to be no room to doubt that Judge Aguilar knew a grand jury was meeting. Solomon told Judge Aguilar, in a recorded conversation on May 26, 1988, one month before the alleged violation, that the FBI had told him a grand jury was in session. Judge Aguilar indicated his understanding of this information by observing, later in the same conversation, "if they subpoena me I may have a problem."

However, the evidence is considerably thinner that Judge Aguilar knew that the FBI agents to whom he lied were expected to be witnesses before the grand jury. There is no direct evidence at all. Nor do Judge Aguilar's prevarications support an unequivocal inference of knowledge. It is equally plausible that he hoped his lies would dissuade the government from seeking an indictment against him.

Certainly, as the government points out, the jury could infer that Judge Aguilar, an experienced federal judge, deduced that the investigating FBI agents were likely to be witnesses before the grand jury. The availability of this inference, however, points up the danger of the "high probability" jury instruction. The jury could have concluded that Judge Aguilar did not know the agents were likely witnesses, but should have. In the absence of an instruction precluding conviction for negligence, I cannot be confident the jury did not convict for negligence.

Jury instructions are not to be examined in isolation. *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1412 (9th Cir. 1986). The erroneous knowledge instruction could theoretically have been cured by the trial judge's instruction on intent to "impede, interfere with or obstruct the functioning of that grand jury." In my view, however, the intent instruction does not ameliorate the flaw in the knowledge instruction. The jurors may have concluded that Judge Aguilar intended to "obstruct the functioning of the grand jury" by inducing the government not to seek an indictment against him. Yet the government does not argue, and I do not believe, that such a showing is sufficient to violate section 1503. I therefore conclude that the erroneous knowledge instruction requires reversal of the conviction on Count Eight.

II

In imposing sentence, the district court assigned Judge Aguilar an offense level of 16,¹ which carries a sentence of twenty-one to twenty-seven months and a fine of \$5,000 to \$50,000 for persons in criminal history category I. The court then departed downward and assigned Judge Aguilar an offense level of 10 and sentenced him to two six month terms of imprisonment, to be served concurrently, and fined him \$1000 on each count. The government appeals the district court's downward departure from the Sentencing Guidelines.

Under 18 U.S.C. § 3553(b), the district court must sentence a defendant within the applicable Guidelines range unless "the court finds there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Here, the court offered the following reasons for its departure:

I do think Judge Aguilar now commences a long course of adversarial proceedings, . . . beginning with the Ninth Circuit Judicial Council, with the state and local bar associations, with the House of Representatives, with the United States Senate. Those proceedings will be long, humiliating, and burdensome and may even bring into a play a number of events that are not part of the convictions for which he

¹ The district court increased the offense level for Count Six from 12 to 14 for abuse of public trust under U.S.S.G. § 3B1.3. Judge Aguilar was convicted of multiple counts. Therefore, in calculating the combined offense level under U.S.S.G. § 3D1.4, the district court added two levels, resulting in a combined offense level of 16. Because we vacate one count of conviction, § 3D1.4 no longer applies. The maximum offense level applicable is 14, rather than 16.

stands convicted before the court at this time. I think that burden is a major and substantial punishment that warrants some degree of departure downward.

The district court emphasized that its willingness to depart was limited only to those features that it believed "are so different and unique with this defendant, . . . and are so extensive and will be so enduring that it would be the sort of ground upon which a sentencing commission would favor a court sitting here today using it as a basis for departure."

Our review of the departure imposed by the district court involves three steps. *United States v. Lira-Barraza*, 941 F.2d 745, 746-47 (9th Cir. 1991) (en banc). First, we must determine whether the district court had the legal authority to depart from the Sentencing Guidelines. *Id.* at 746. Second, we review for clear error factual findings supporting the existence of the identified circumstance. *Id.* at 746-47. Third, we must determine whether a six level departure downward was unreasonable. *Id.* at 747. Here, because the district court's statement did not include "a reasoned explanation of the extent of the departure founded on the structure, standards and policies of the Act and Guidelines," *id.*, the district court failed to comply with the underlying requirements of the third step of *Lira-Barraza* and we must remand.

On remand, the district court may again choose to depart downward based on the additional punishment awaiting Judge Aguilar. The government vigorously contends that the district court does not have the legal authority to do so. We therefore believe that some comment on the appropriateness of departure is warranted.

The district court may depart if it identifies a mitigating circumstance of a kind or to a degree the Commission did not adequately take into account when formulating the Guidelines. *Id.* at 746. Even if the circumstance is one not adequately considered, the court cannot depart if the cir-

cumstance is inconsistent "with the sentencing factors prescribed by Congress in 18 U.S.C. § 3553(a), [and] with the Guidelines. . . ." *Id.*

The mitigating circumstance upon which the district court based its downward departure was the additional punishment it anticipated Judge Aguilar would suffer during the course of potential disbarment and impeachment hearings. The government argues that the Guidelines account for that circumstance in sections 3B1.3 and 3E1.1, which respectively establish an upward adjustment if the defendant had abused a position of trust and a downward adjustment if the defendant accepts responsibility for his actions by resigning his office. See U.S.S.G. §§ 3B1.3, 3E1.1 and comment. (n.1(f)). The court's ruling, however, was not based solely on the likelihood of impeachment, but on the likelihood that Judge Aguilar will suffer additional punishment throughout the course of several disciplinary hearings. The provisions cited by the government cannot be said to account for this circumstance.

Nor was the departure "inconsistent with the Guidelines' policy that disparity in sentencing should never be occasioned by socioeconomic factors." The district court did not rely on socioeconomic status to support its departure. Rather, the district court relied upon a determination that Judge Aguilar, because he is a federal judge, would be subject to punishment in addition to the court-imposed sentence. Judge Aguilar's job accounts for this extra punishment; the departure was not based on his level of wealth, privilege, or "status in society."² *Cf. United States*

² Although Judge Aguilar's job may constitute one component of his socioeconomic status, see *Lopez*, 938 F.2d at 1297, unlike Judge Hall, we are not convinced that one *component* of his socioeconomic status, his job, defines his socioeconomic status. See Judge Hall's Opinion, at 624.

We note in passing that, although the Guidelines specifically state

v. Lopez, 938 F.2d 1293, 1297 (D.C.Cir. 1991). Additional punishment appears to be a valid mitigating factor. *Cf. United States v. Lara*, 905 F.2d 599, 601-03 (2d Cir. 1990) (departure upheld where defendant's vulnerability required prison officials to place him in solitary confinement, increasing the severity of his punishment).³ Moreover, unlike Judge Hall, we do not consider each particular aspect of the additional punishment facing Judge Aguilar "abstractly and alone," *United States v. Cook*, 938 F.2d 149, 153 (9th Cir. 1991), but instead recognize the "unique combination of factors" that comprises the mitigating circumstance in this case. *Id.*

Judge Aguilar, if he is subjected to impeachment proceedings, will suffer additional punishment by the government, imposed in a public, quasi-judicial proceeding. If convicted upon impeachment, not only will he be removed

that "socioeconomic status" is not a relevant factor in sentence determination, U.S.S.G. § 5H1.10, this court has recently suggested that consideration of socioeconomic "factors" may not always be precluded. *United States v. Valdez-Gonzalez*, 957 F.2d 643, 649 n. 3 (9th Cir. 1992).

³ The extra punishment identified by the district court can be distinguished from other collateral effects arising from conviction. For example, our court has held that the likelihood of deportation is not a valid basis for departure. *United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990); *United States v. Ceja-Hernandez*, 895 F.2d 544 (9th Cir. 1990). These deportation cases, however, are distinguishable in two respects. First, despite its undeniable impact, deportation is not considered punitive. See *Galvan v. Press*, 347 U.S. 522, 531, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954). Second, *Alvarez-Cardenas* involved a drug conviction, and *Ceja-Hernandez* a conviction for illegal presence in the United States. Deportation as a consequence of the former is not rare, and as a consequence of the latter is the rule. We must therefore assume that the Sentencing Commission took the possibility of deportation into account when determining the appropriate offense level for these crimes. See *Ceja-Hernandez*, 895 F.2d at 545.

from his otherwise life-tenured position, he will be disqualified from holding any future government appointive position. See *United States v. Brown*, 381 U.S. 437, 448, 85 S.Ct. 1707, 1714, 14 L.Ed.2d 484 (1965) ("Disqualification from office may be punishment, as in cases of conviction upon impeachment.") (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall) 277, 320, 18 L.Ed. 356 (1866)). If convicted upon impeachment, Judge Aguilar will also suffer full forfeiture of his pension rights, a loss of considerable economic significance.⁴ Unlike most federal officers and employees, an Article III judge's pension does not vest until he attains at least age sixty-five and meets certain service requirements, typically fifteen years. See 28 U.S.C. § 371. In contrast, had he been an Article I judge such as a bankruptcy judge, or a magistrate judge, Judge Aguilar would have begun vesting upon completion of eight years of service and by now would be nearly fully vested in his right to receive the salary of the office for life beginning at age sixty-five. See 28 U.S.C. § 377. Therefore, unlike an Article I judge, or any other federal official or employee for that matter, an Article III judge who leaves office for any reason prior to the age of sixty-five forfeits all pension rights no matter how many years he may have served. From publicly available material, it appears that Judge Aguilar has served on the bench since 1980; should he leave office before April 15, 1996, the date of his sixty-fifth birthday, he will receive no retirement benefits whatsoever. This will be true whether he resigns voluntarily or suffers impeachment.

⁴ The right to receive, beginning at age sixty-five, the salary of the office (presently \$133,600 per annum) for life, can be calculated from actuarial tables; the value of such annuity is likely to exceed \$1.3 million dollars. See 28 U.S.C. § 371(a); cf. 5 U.S.C. § 8339.

Thus, the additional formal punishment to be imposed upon Judge Aguilar as a result of his conviction can be distinguished, both qualitatively and quantitatively, from the "substantial pain and humiliation" suffered by criminal defendants who are "well-known figures in the worlds of government and finance." For that reason we reject the suggestion that the additional punishment Judge Aguilar will suffer is not "atypical."⁵ See U.S.S.G. Ch. 1, Pt. A4(b). While Judge Hall may be right that "well-known figures" of high social standing appear as criminal defendants all too frequently, the criminal conviction of an Article III judge is, thankfully, still a rare occurrence. Notwithstanding the recent impeachments of several federal judges,⁶ Judge Aguilar is the first convicted federal judge to be sentenced under the Guidelines. As such, his case does not appear to fall within the heartland of cases for which the Guidelines were designed. Moreover, we reiterate that the additional punishment identified by the district court is not based upon Judge Aguilar's "personal financial hardship," "foreclosure of career opportunities,"

⁵ Similarly, a forfeiture proceeding following a drug or racketeering conviction, or a civil damage award after a conviction for a white collar crime, simply is not "atypical." We cannot presume the Sentencing Commission did not anticipate these common collateral effects of conviction for such crimes when designing the Guidelines.

⁶ See *Nixon v. United States*, 938 F.2d 239, 248, 250 (D.C.Cir. 1991) (Edwards, J., dissenting in part and concurring in judgment) (noting the recent impeachments of Harry E. Claiborne and Alcee Hastings, as well as Walter Nixon), *aff'd*, ___ U.S. ___, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993); see also *United States v. Claiborne*, 765 F.2d 784 (9th Cir. 1985), *cert. denied*, 475 U.S. 1120, 106 S.Ct. 1636, 90 L.Ed.2d 182 (1986); *United States v. Nixon*, 816 F.2d 1022 (5th Cir.), *reh'g denied*, 827 F.2d 1019 (5th Cir. 1987), *cert. denied*, 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988); and *United States v. Collins*, 972 F.2d 1385 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993).

or, especially, "loss of position." Judge Hall's Opinion, at 624-25. Thus, we are satisfied that Judge Bechtle had the legal authority to depart; the first element of *Lira-Barraza* was met.

Lira-Barraza also requires us to review for clear error the district court's factual findings supporting the existence of the identified circumstance. *Lira-Barraza*, 941 F.2d at 746-47. The government argues, in effect, that no factual findings were made as to the possibility that Judge Aguilar might avoid the humiliation of impeachment by resigning. The government's argument, as to step two, is well taken but may be ultimately moot. On remand, the district court should specifically consider whether other additional punishment, such as forfeiture of pension and disbarment, will result in the event of Judge Aguilar's potential resignation to avoid impeachment.

"The Guidelines are not a straightjacket for district judges. They do provide discretion to depart." *Cook*, 938 F.2d at 152. Congress has instructed sentencing courts "to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A). In this case, Judge Hall would have us remand for the imposition of a more severe sentence even though we *reverse* one count of conviction. To do so without allowing the district court to consider in its discretion the additional formal punishment and the unusual financial ramifications that arise because of the appellant's job as an Article III judge would violate Congress's mandate to provide just punishment.

In sum, we agree that additional punishment is a permissible basis for downward departure. We remand, however, for the district court to follow the procedures established in *Lira-Barraza*. In particular, the court must consciously measure the extent of its departure against the sentencing structure established by the Act and the Guidelines. *Lira-Barraza*, 941 F.2d at 748.

III

In conclusion, I would affirm Judge Aguilar's conviction as to Count Six, reverse his conviction as to Count Eight, and remand for resentencing in accordance with the foregoing opinion.